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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

THE CONSOLIDATED CITY
OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
a municipal corporation,

Petitioner,

vs.

WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES L. HARRISON
GENERAL COUNSEL
(Counsel of Record)
STEVEN E. ROHAN and
LEONARD S. MAGID
(Counsel)
421 W. Church Street, Suite 715
Jacksonville, Florida 32202
(904) 630-4900
For Petitioner

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit in **Nash v. Consolidated City of Jacksonville,** 905 F.2d 355 (11th Cir. 1990) disregarded the Supreme Court mandate to consider the instant case in light of **Wards Cove Packing Company, Inc. v. Antonio,** 490 U.S. 642 (1989), leaving **Nash v. Consolidated City of Jacksonville,** 837 F.2d 1534 (11th Cir. 1988) and **Nash v. Consolidated City of Jacksonville,** 905 F.2d 355 (11th Cir. 1990) as published contradictions to **Wards Cove?**

2. Whether the Eleventh Circuit erroneously restricted the type of evidence it considered legally sufficient to articulate a business justification in conflict with **Washington v. Davis,** 426 U.S. 229 (1976), **Watson v. Fort Worth Bank and Trust,** 487 U.S. 977 (1988) and

Wards Cove Packing Company, Inc. v. Antonio, 490 U.S. 642 (1989)?

3. Whether the Eleventh Circuit violated the "law of the case" doctrine by ignoring and contradicting the holdings of **Nash v. Consolidated City of Jacksonville**, 763 F.2d 1393 (11th Cir. 1985)?

4. Whether the Eleventh Circuit violated stare decisis and the principle of interpanel accord by disregarding a prior panel determination in **Nash v. Consolidated City of Jacksonville**, 763 F.2d 1393 (11th Cir. 1985) that the City's evidence was legally sufficient?

5. Whether the Eleventh Circuit erred by directing a verdict against the City in conflict with **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986)?

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The opinion of the Eleventh Circuit after remand from the United States Supreme Court is reported at **Nash v. Consol. City of Jacksonville, Duval County**, 905 F.2d 355 (11th Cir. 1990) (hereinafter referred to as **"Nash III")(Appendix-87)**;* the opinion of the Supreme Court is reported at **Consolidated City of Jacksonville, Duval County, v. Nash**, 104 L.Ed.2d 1015 (1989)(hereinafter referred to as **"Nash SC")**(A-85); two separate earlier opinions of the Eleventh Circuit are reported at **Nash v. Consol. City of Jacksonville, Duval County**, 763 F.2d 1393 (11th Cir. 1985) (hereinafter referred to as **"Nash I")**(A-28) and **Nash v. Consol. City of Jacksonville, Duval**

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* Hereinafter the Appendix is referred to as (A-__).

County, 837 F.2d 1534 (11th Cir. 1988)(hereinafter referred to as **"Nash II"**)(A-65).

The opinion and orders of the district court, dated June 4, 1984 (A-4) and May 4, 1987 (A-44) have not been officially reported. The Eleventh Circuit order denying rehearing and suggestion of rehearing en banc is not yet reported. (A-98).

JURISDICTION

i) The judgment of the Eleventh Circuit was entered July 9, 1990.

ii) The order denying rehearing and suggestion of rehearing en banc was entered September 28, 1990.

iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 10.1 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

42 U.S.C., Section 2000, et seq.

29 C.F.R., Part 1607, et seq.

STATEMENT OF CASE

This is the second time the petitioner seeks review of this cause in the United States Supreme Court.

The Supreme Court granted certiorari in **Nash SC**, immediately following the decision of **Wards Cove Packing Company, Inc. v. Atonio**, 490 U.S. 642, 104 L.Ed.2d 733 (1989), and vacated the **Nash II** decision for reconsideration in light of **Wards Cove.** The issues before the Court in **Nash SC** were the **Wards Cove** issues of the proper burden of persuasion in an employment disparate impact case, and the definition and application of the terms "job related" and "business necessity".

Upon remand in **Nash III**, the Eleventh Circuit failed to consider these **Wards Cove** issues. The **Nash III** decision reinstated **Nash II** merely focusing on the

plaintiff's initial prima facie case in disparate impact analysis.[1]

The facts leading to the **Nash III** decision are as follows: In 1981, Winston Nash (Nash), a black male, failed a promotional examination to be a firefighter lieutenant with the City of Jacksonville (City). The examination had a disparate impact upon blacks.

On March 14, 1983, Nash filed his complaint under Title VII of the Civil Rights Act of 1964, as amended, alleging race discrimination in promotions under a disparate impact theory of recovery. At trial, the City established that: (1) the test questions were prepared according to EEOC guidelines relating to content validity and (2) the test questions

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1. The Plaintiff's initial burden is whether disparate impact even occurred. At all times, the City conceded that there was disparate impact. This was never an issue in this case. See **Nash** III at 357. (A-91-92).

related to functions actually performed on the job. (A-118-125). Nash admitted at trial that the test questions were job related.[2] (A-112-117). The examination was not introduced into evidence.[3]

The United States District Court for the Middle District of Florida (trial court) entered judgment for the City. Nash appealed to the Court of Appeals for the Eleventh Circuit.

On June 25, 1985, the Eleventh Circuit in **Nash** I reversed the trial court's decision stating that the court applied the law controlling in disparate treatment cases rather than disparate impact law. The Eleventh Circuit

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2. The trial evidence became law of the case in **Nash** I at 1395. (A-33, 34).

3. A protective order denying Nash production of the examination was granted after he failed to file timely opposition to the City's motion. (A-100-104).

concluded that the trial court placed only a burden of articulation on the City.[4] Significantly, the Eleventh Circuit specifically determined that the City more than sufficiently met this burden of production, when it ruled:

> It is true that defendant, in its testimony, went much beyond mere "articulation," and the court recited this testimony with every indication of believing it, yet the court at 180-181 repeatedly states that plaintiff has failed to persuade the court "by a preponderance of the evidence." The idea seems to be that mere "articulation" shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to "impact" employment test

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4. The trial court's analysis was ultimately vindicated by **Wards Cove**.

cases that we have decided. (Emphasis added).[5]

Nash I at 1397-1398. (A-39).

Neither party sought a trial de novo after remand. No additional evidence was taken. Nash and the City filed proposed findings of fact and conclusions of law. (A-105-111). The trial court again entered judgment for the City and Nash again appealed to the Eleventh Circuit.

On February 25, 1988, the Eleventh Circuit in **Nash** II reversed on the ground that the trial court again misapplied the law and remanded with instructions to the trial court to promote Nash. The Eleventh Circuit further stated that the City failed to meet a burden of

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5. This was a favorable finding of the majority. It can be reasonably inferred from Judge Fay's specially concurring opinion that he believed that the trial court's factual and legal conclusions were correct. **Nash** I at 1399. (A-43).

production. The City's petition for rehearing and suggestion of rehearing en banc to the Eleventh Circuit was denied on March 29, 1988.

The City then petitioned the Supreme Court for a writ of certiorari on the grounds that, inter alia, the Eleventh Circuit rendered a decision which required an improper standard of proof for a disparate impact case; the Eleventh Circuit's reevaluation of the evidence was patently violative of the Supreme Court's clearly erroneous standard; and the Eleventh Circuit misapplied the job-relatedness standard.

Certiorari was granted for reconsideration in light of **Wards Cove** and the **Nash II** decision was vacated. **Nash SC.** In **Nash III**, the Eleventh Circuit failed to consider the **Wards Cove**

issues upon which remand was granted, and again reversed the trial court reinstating **Nash** II. Rehearing and rehearing en banc in the Eleventh Circuit were again denied.

REASONS FOR GRANTING CERTIORARI

I

THE ELEVENTH CIRCUIT DISREGARDED THE SUPREME COURT MANDATE, AND *NASH II* AND *III* NOW STAND AS PUBLISHED CONTRADICTIONS TO *WARDS COVE.*

The Supreme Court's mandate to the Eleventh Circuit was to reconsider **Nash** II in light of the pronouncements in **Wards Cove Packing Company, Inc. v. Atonio**, 490 U.S. 642, 104 L.Ed.2d 733, (1989). In **Wards Cove**, the Court held that the employer's obligation upon a demonstration of disparate impact is to produce evidence that a challenged practice serves, in a significant way, the legitimate goals of the employer.[6] The Court further clarified the

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6. "...[A]t the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate goals of the employer..." **Wards Cove**, 104 L.Ed.2d at 752.

appropriate allocation of proof in a disparate impact case.[7] These principles required a complete overruling of **Nash** II by the Eleventh Circuit, since **Nash** II placed upon the City the burden of proving that the promotional test at issue fit within the "very narrow" definition of business necessity. (Emphasis added). **Nash** II at 1539. (A-80).

The City's petition for writ of certiorari in **Nash** SC raised only the above **Wards Cove** issues. The Eleventh Circuit in **Nash** III, however, disregarded this Court's mandate and limited its analysis to the statistical prima facie case of Nash, which was never contested.

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7. "In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff..."
Wards Cove, 104 L.Ed.2d at 753.

The Eleventh Circuit in **Nash III** acknowledged the Court's **Wards Cove** holding regarding the quantification of the employer's burden, even referring to it as a "relaxation" of past Eleventh Circuit standards.[8] Nevertheless, the Eleventh Circuit failed to discuss or otherwise analyze whether the City, in demonstrating EEOC approved content validity, met its burden of production under the "relaxed" **Wards Cove** standard. Rather, the **Nash III** panel conclusorily revived its **Nash II** holding that the City had failed to meet its burden of production[9] and ignored the **Nash I** holding

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8. "...[W]e note that the Supreme Court also relaxed an employer's evidentiary burden by only requiring that the employer produce evidence of a legitimate business justification for an employment practice." (Emphasis added). **Nash III** at 358. (A-96).

9. "This holding [**Wards Cove**] does not affect our conclusion because Jacksonville failed to meet its burden of producing evidence that the exam was job related..." **Nash III** at 358. (A-96).

that the City exceeded this burden.[10]

Nash II held that the burden of proving job-relatedness shifted to the employer upon a showing of disparate impact and that the City failed to articulate sufficient justification to raise a factual issue of job-relatedness. That decision was vacated by the Supreme Court on certiorari. **Nash SC.** The Eleventh Circuit on remand in **Nash III** reinstated the **Nash II** decision and declared that **Wards Cove** "does not directly affect this case." **Nash III** at 356. (A-89). To the contrary, **Wards**

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10. This **Nash** II/III finding is diametrically opposed to **Nash** I's finding that, "[i]t is true that defendant, in its testimony, went much beyond mere 'articulation,'..." **Nash** I at 1397. (A-39). It is significant that **Nash** I was decided on a stricter standard than **Wards Cove** requires. This point is discussed in further detail at Point III, infra.

Cove controls this case and requires its reversal.[11]

Despite this Court's mandate, the Eleventh Circuit in **Nash III** erred by not applying **Wards Cove** to the facts found in the trial court's order. In fact, the **Nash III** panel never made an independent legal finding that the trial court's findings were insufficient to move the case to the next stage of disparate impact analysis, that is, Nash's ultimate burden to prove discrimination.[12] It

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11. The Eleventh Circuit in **Nash** I stated that the question of whether the burden of persuasion or merely a burden of production shifts to the employer may be a "momentous one" determining the outcome of the case. **Nash** I at 1397. (A-39). Remarkably, the **Nash** III panel concluded that the **Wards Cove** clarification of the appropriate allocation of proof did not warrant a further analysis of the City's evidence.

12. On the otherhand, **Nash** I exhaustively set forth the City's prima facie case. **Nash** I at 1395. (A-33, 34).

merely reinstated **Nash II.**[13]

The Eleventh Circuit found that the only use for **Wards Cove** was in analyzing the plaintiff's case. The Eleventh Circuit completely failed to recognize or discuss the effect of **Wards Cove** on the employer's burden of production.[14]

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13. The Eleventh Circuit has demonstrated a reluctance to adopt the more enlightened view. Following **Watson v. Fort Worth Bank and Trust**, 488 U.S. 977 (1988), the court stated:

> ...Pending final resolution of this issue, however, this Circuit must adhere to the settled authority "stating flatly that the employer bears the burden of proving that a practice is job-related."

Stephen v. PGA Sheraton Resort, LTD., 873 F.2d 276, 279-280 (11th Cir. 1989) citing **Powers v. Alabama Department of Education**, 854 F.2d 1285, 1292 n. 11 (11th Cir. 1988).

14. Approximately one hundred (100) published lines were utilized to analyze **Wards Cove** principles never at issue. (A-93-96). In contrast, one sentence was utilized to conclusorily state that the **Wards Cove** principles at issue did not apply. **Nash III** at 357, 358. (A-96).

The **Nash** III "CONCLUSION" demonstrates that the Eleventh Circuit failed to honor the mandate:

> III CONCLUSION
>
> Following the Supreme Court's directions, we have reconsidered **Nash** II in light of **Wards Cove** and find that the teachings of **Wards Cove** do not impact upon the type of evidence Nash presented. Accordingly, we reinstate **Nash** II... (Emphasis added).

Nash III at 358. (A-97). The court only analyzed Nash's prima facie burden. The conclusion illustrates the obvious, that is, the City's evidence was not analyzed in view of **Wards Cove.**

The reinstatement of **Nash** II repudiated **Wards Cove** because **Nash** II placed a burden of proving, as opposed to a burden of articulation, on the City and required a more rigid standard of job-relatedness. Restoring **Nash** II is tantamount to a published adoption of the

Wards Cove dissent.[15] It raises the question of what purpose was served by this Court's grant of certiorari in **Nash SC.**

Nash III, together with its reinstatement of **Nash II**, should be reversed.

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15. See the dissent in **Wards Cove** where **Nash** I's improper evidentiary burdens were cited with approval. **Wards Cove**, 104 L.Ed. 2d at 759 n.14.

II

THE ELEVENTH CIRCUIT ERRONEOUSLY RESTRICTED THE TYPE OF EVIDENCE IT CONSIDERED LEGALLY SUFFICIENT TO ARTICULATE A BUSINESS JUSTIFICATION DEFENSE IN CONFLICT WITH *WASHINGTON*, *WATSON* AND *WARDS COVE*.

The Eleventh Circuit limited the evidence an employer may produce to satisfy its burden in a Title VII case in contravention of substantial Supreme Court precedent.

Nash III did not consider the employer's burden of justification as mandated by the Supreme Court remand. Rather, it reinstated **Nash** II which concluded that the evidence introduced at trial, including the exam formation methodology and Nash's admissions of job-relatedness, was legally insufficient to support a mere prima facie showing of job-relatedness.

The Eleventh Circuit in **Nash II/III** established its own narrow standard governing a prima facie defense:

> Just because test questions are drafted by qualified city employees does not mean that the questions are job-related. Even qualified supervisory personnel can construct test questions very unrelated to job performance. The fact that the City presented evidence relating to how the test was constructed is not legally sufficient by itself to show [prima facie] the questions were job-related. (Emphasis added).

Nash II at 1537. (A-75).

> Job-relatedness can be established through the testimony of expert witnesses supported by a validation study. In this case, however, there was no validation study conducted by an expert. Without the test itself and with no testimony presented by the defendant regarding job-relatedness of the questions, there was no way for the district court to conclude that the questions were job related. (Citations omitted). (Emphasis added).

Nash II at 1538. (A-76-77).

> In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden. (Emphasis added).

Nash II at 1538 n.6. (A-77).

This extremely limiting holding violated Supreme Court precedent which has consistently refused to require a specific method of rebutting adverse impact. **Nash II** in effect held that only outside expert testimony will be sufficient to defend a disparate impact prima facie case.

In **Washington v. Davis**, 426 U.S. 229, (1976), the Supreme Court declared, "[i]t appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." Id. at 247 n.13.

In **Teamsters v United States**, 431 U.S. 324 (1977), the Supreme Court illustrated specific examples of evidence used in defeating a discriminatory pattern or practice case and also stated that the examples were not exhaustive:

> The employer's defense must, of course, be designed to meet the prima facie case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use...In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. (Emphasis added).

Id. at 360 n.46

Moreover, in **Watson v. Fort Worth Bank and Trust**, 487 U.S. 977 (1988), the plurality reviewed the type of evidence legally sufficient to support a finding of an examination's job-relatedness and

reiterated the broad evidentiary alternatives available to the employer:

> Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance.

Id. at 998. The restrictive approach taken by the Eleventh Circuit in **Nash** II/III contrasts with the **Watson** plurality view.[16]

The Eleventh Circuit in **Nash** II concluded that the City failed to satisfy its burden by not offering testimony of a qualified expert to explain the job-relatedness of the questions. This contradicts the above precedent. The findings of the trial court indicated

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16. **Watson** is the predecessor to **Wards Cove** relied upon extensively therein.

that City employees testified, as qualified experts in their fields, to the job-relatedness of the test.[17] (A-118-125). Moreover, Nash conceded the job-

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17. In **Nash** III, the Eleventh Circuit again raised the issue that the City never introduced the examination into evidence. **Nash** III at 357. (A-92). This fact has been unnecessarily problematic to the court. In **Nash** II, the court repeated its **Nash** I concerns by suggesting that if the trial court had shifted the burden of persuasion to the City, "...we think defendant might have felt it incumbent to produce the examination questions." (Emphasis added). **Nash** II at 1536. (A-72).

However, there is no legal requirement for an employer to enter its examination into evidence particularly in light of the **Wards Cove** standards clearly placing the burden of proof on the employee.

Moreover, Nash admitted that the examination questions were related to the functions performed by combat firefighters. (A-112-117). Therefore, upon remand, the City found it unnecessary to use the exhibit.

In **Nash** I, Nash was only denied disclosure of the exhibit after he failed to properly respond to a motion for a protective order late in the discovery process. (A-100-104). Given an opportunity to bring the examination into evidence at a de novo trial after **Nash** I, Nash declined. (A-105).

relatedness of the questions. (A-112-117). By rejecting the relevant evidence offered by the City,[18] the Eleventh Circuit is interfering with an employer's ability to present a substantive prima facie defense to a discrimination suit by limiting the type of evidence an employer may use.

It is significant that in **Wards Cove** the Supreme Court stated:

> ...[T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. (Emphasis added).

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18. This evidence was cogently recited and accepted with approval in **Nash** I at 1395, 1396. (A-33-35). Note also that **Nash** I stated, "[t]he method of test preparation was also indirect evidence of job-relatedness." **Id.** at 1396. (A-35).

Wards Cove, 104 L.Ed.2d at 753. The Supreme Court's admonitions regarding the evils of an overly restrictive disparate impact analysis have come to fruition in this case. The Eleventh Circuit, by reinstating **Nash II**, eliminated in-house content validity and mandated the use of outside experts to justify tests that result in disparate impact. As demonstrated above, this is in direct conflict with the directions of **Washington v. Davis**, **Watson v. Fort Worth Bank and Trust**, and **Wards Cove**.

The decision below should be reversed and the case remanded for entry of the trial court's judgment.

III

THE ELEVENTH CIRCUIT VIOLATED THE "LAW OF THE CASE" DOCTRINE BY IGNORING AND CONTRADICTING THE HOLDINGS OF *NASH I*.

The instant case presents the Court with the opportunity to fully consider the implications of **Nash** III's failure to apply the "law of the case" established in **Nash** I. Future litigants and courts[19] would benefit by the Court's fresh articulation of the criteria required for proper

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19. One legal commentator claims that a conflict among the circuit courts of appeal exists in the varying degrees of stringency in which "the law of the case" doctrine applies. Joan Steinman, **Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation**, 135 U. Pa. L.Rev. 595, 613 (March 1987). She further states that "no monolithic nationwide doctrine prevails" and that the Supreme Court has not explored the doctrine at length or in a decision having broad precedential value. **Id.** The case at bar presents the Court a framework within which to analyze the doctrine in detail and provide uniform guidance to the lower courts.

rejection of, or adherence to, "law of the case" principles.

The Eleventh Circuit in **Nash III** failed to reconcile its own contradictory legal and evidentiary conclusions regarding the sufficiency of the City's evidence of articulation.[20] In **Nash I**, the Eleventh Circuit ruled that the City exceeded its burden of production under a "business necessity" standard in a disparate impact context:

> It is true that defendant, in its testimony, went much beyond mere "articulation," ...

Nash I at 1398. (A-39).

The Eleventh Circuit's stringent "business necessity" requirement was

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20. The "law of the case" doctrine is frequently applied to rulings on the sufficiency of evidence. See 5 Am.Jur. 2d, **Appeal And Error**, Section 759. **United States v. Burns**, 662 F.2d 1378, 1384 (11th Cir. 1981).

thereafter overruled by the Supreme Court's clarification of the appropriate evidentiary burdens in **Wards Cove**. **Nash** III expressly noted that the **Wards Cove** holding was a "relaxation" of the stricter Eleventh Circuit standards it imposed in **Nash** I and **Nash** II. Nevertheless, after examining the exact **Nash** I record, the **Nash** III panel stated that the same City evidence was legally insufficient under the "relaxed" burden of articulation:

> ...Jacksonville failed to meet its burden of producing evidence that the exam was job related and served the asserted business justification of promoting the most qualified firefighters...

Nash III at 358. (A-96).

In addition, **Nash** I held:

> The method of test preparation was also indirect evidence of job-relatedness.

Nash I at 1396. (A-35).[21] The above "law of the case" on the issue of the quality of the City's evidence was directly contradicted by **Nash** II and **Nash** III:

> The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job related.

Nash II at 1537. (A-75).

The Eleventh Circuit did not even discuss the classic prerequisites for its rejection of the "law of the case." This important doctrine was simply ignored, even though the Eleventh Circuit has a long history of adherence

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21. It is significant that after the **Nash** I decision, the trial court on remand was bound by the "law of the case" on this issue.

to "law of the case" principles. **Litman v. Massachusetts Mut. Life Ins. Co.**, 825 F.2d 1506 (11th Cir. 1987); **Baumer v. United States**, 685 F.2d 1318 (11th Cir. 1982); **United States v. Burns, supra**, 662 F.2d 1378.

The "law of the case" doctrine bears a close resemblance to the concept of stare decisis. It invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent stages in the same case. **United States v. Burns, supra,** at 1384. Stare decisis makes each judgment a statement of precedent binding in future cases. See 1B **J. Moore Federal Practice,** ¶ 0.401 et. seq. (2d ed. 1988). The "law of the case" principle has been regarded as a rule of practice. **United States v. United**

States Smelting R. & M. Co., 339 U.S. 186, 199 (1950).[22]

Under the doctrine, a decision on a legal issue by an appellate court should be followed on a later appeal in the appellate court unless: (1) substantially different evidence is produced at a subsequent trial; (2) controlling authority compels a contrary decision of law applicable to the issue; or (3) the prior decision was clearly erroneous and would work a manifest injustice. **Baumer v. United States, supra,** at 1320.

The fact that the Eleventh Circuit did not acknowledge the "law of the case" implications of **Nash** I is

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22. While the Court in **United States v. United States Smelting R. & M. Co., supra,** stated that "law of the case" is discretionary, this case presents the Court with an opportunity to define the limits of that discretion and to establish a clear standard.

extraordinary in the face of overwhelming factors favoring its application in the present case.

First, the trial court and all panels of the Eleventh Circuit examined the identical record. After **Nash** I, neither party sought a trial de novo on remand. (A-105-111). No new evidence was ever taken. Yet, the published Eleventh Circuit opinions stand in open conflict to each other and are legally irreconcilable.

Secondly, the vacating of **Nash** II by the Supreme Court in **Nash** SC, presumably for the Eleventh Circuit to consider the "relaxed" standard of evaluating the employer's evidence, did not compel a corresponding reversal of the **Nash** I ruling on the legal sufficiency of the City's evidence or the type of indirect evidence which may

be utilized to demonstrate job-relatedness. To the contrary, due deference to the prior panel finding after reviewing the exact evidence was required.

If the City exceeded its production threshold under the stringent "business necessity" standard in **Nash** I, a fortiori, the identical record should have supported the "relaxed" legitimate business justification defense after **Wards Cove**. To conclude otherwise is an abuse of discretion.[23]

An appellate court's departure from the doctrine raises greater

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23. The Eleventh Circuit in **Nash** I observed that the question of the appropriate evidentiary burdens may be a "momentous one" determining the outcome of the case. **Nash** I at 1397. (A-39). After **Wards Cove**, an analysis of this "momentous" legal issue compels affirmance of the first trial court decision because in retrospect the correct burden of persuasion was originally applied.

concerns than when a trial court rejects its own decision. Respect for precedent established by findings of courts of appeal is at the foundation of our legal process. Disregard of doctrines demanding respect for precedent undermine the public's trust. As the Eleventh Circuit once explained:

> Institutional tools perpetuate the value of stability and predictability -- essential factors in the proper operation of the judiciary. Predictability is essential not only to lawyers who must advise their clients about the law, but also to the notion of judicial review in creating a stable body of law. It is generally thought that appellate courts are in a better position than trial courts to accommodate the need for stability. Reviewing courts are better able to maintain the necessary continuity of doctrine over time. (Citations omitted).

Litman v. Massachusetts Mut. Life Ins. Co., supra, at 1510.

In **Nash III**, the Eleventh Circuit departed from fundamental "law of the case" principles without even addressing its open deviation from this precedential precept. The decision in **Nash III** should be vacated or reversed and the case remanded for entry of judgment consistent with **Wards Cove** and the **Nash I** ruling upholding the legal sufficiency of the City's evidence.

IV

THE ELEVENTH CIRCUIT VIOLATED *STARE DECISIS* AND THE PRINCIPLE OF INTERPANEL ACCORD BY DISREGARDING *NASH I's* PRIOR PANEL DETERMINATION THAT THE CITY'S EVIDENCE WAS LEGALLY SUFFICIENT.

The granting of certiorari herein would permit a determination by the Court of the significance of stare decisis and the principle of interpanel accord by appellate courts, and provide a standard to be applied nationally.

Interpanel accord implies an obligation[24] to address and reconcile

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24. Interpanel accord was effectively described by the Federal Circuit in **Johnston v. IVAC Corp.**, 885 F.2d 1574, 1579 (Fed.Cir.1989) as follows:

> Where conflicting statements...appear in our precedent, the panel is obligated to review the cases and reconcile or explain the statements, if possible. If not reconcilable and if not merely conflicting dicta, the panel is obligated to follow the earlier case law which is binding precedent. (Emphasis added).

prior panel decisions, which the Eleventh Circuit failed to do.

In **Nash** I, an Eleventh Circuit panel ruled that the City's evidence was a legally sufficient articulation to meet a disparate impact case:

> It is true that defendant, in its testimony, went much beyond mere "articulation,"...

Nash I at 1397. (A-39). Thereafter, the subsequent **Nash** III panel concluded that the identical City evidence was legally insufficient to support the City's burden of articulation. **Nash** III at 358. (A-96). In addition, **Nash** I held that proof of how an examination was prepared was indirect evidence of job-relatedness. **Nash** I at 1396. (A-35). **Nash** II/III held, without en banc consideration, that it was not.

Only a court of appeal sitting en banc or the Supreme Court should have the

authority to reexamine issues decided on a former appeal. See 32 Am.Jur.2d, **Federal Practice and Procedure**, Section 463, and 1B **J.Moore, Federal Practice** ¶ 0.402[1], **Bonner v. City of Prichard**, 661 F.2d 1206 (11th Cir. 1981).

In **Bonner**, the Eleventh Circuit adopted the Fifth Circuit rule that only a court en banc may overrule a predecessor panel. **Id.** at 1209. In acknowledging its strict obedience to this holding, the Eleventh Circuit recognized that no consistent principle of interpanel accord exists among the circuits:

> The various circuits differ somewhat in the extent to which they treat their own decisions as binding on themselves. Some appear at times to treat their own decisions as merely persuasive; others by rule or practice permit one panel to overrule another after prior notice to all judges of what is proposed, followed by no

> objection. The old Fifth followed the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc.

Id. at 1209. **Bonner** relied upon the reasoning in **Moragne v. States Marine Lines, Inc.**, 398 U.S. 375, 403 (1970), citing stability and predictability as essential factors governing the rule of law and in maintaining public confidence.[25]

An appellate court panel's failure to observe precedential precepts by overruling an earlier panel promotes uncertainty and multiple appeals by encouraging future "panel shopping." See **Lehrman v. Gulf Oil Corporation**, 500 F.2d 659, 662 (5th Cir. 1974).

The old Fifth Circuit standard requiring en banc consideration was

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25. **Bonner** also determined that the consideration of precedent was substantive, not procedural. **Bonner, supra**, at 1210, 1211.

disregarded in **Nash** III but should be recognized, by this Court, as part of the substantive law of stare decisis. The earlier **Nash** I decision concerning the legal sufficiency of the City's evidence should control as a matter of law, and **Nash** III should be reversed.

V

THE ELEVENTH CIRCUIT ERRED BY DIRECTING A VERDICT AGAINST THE CITY IN CONFLICT WITH *ANDERSON V. LIBERTY LOBBY, INC.*

The Eleventh Circuit in **Nash** III ruled that the City's evidence relative to its examination process did not rise to the level of a prima facie articulation of job-relatedness. By reinstating **Nash** II, the Eleventh Circuit effectively directed a verdict against the City:

> The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job-related.

Nash II at 1537. (A-75).

Since under **Wards Cove** the City has only a burden of production, and not proof, the holding of the Eleventh Circuit was, in effect, a post trial ordering of a directed verdict against the City. This was done despite the absence of any record reference to a request by Nash for a directed verdict on that issue.[26]

The standard for the consideration of a directed verdict was set forth in **Anderson v. Liberty Lobby, Inc.** 477 U.S. 242, (1986):

> ...[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

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26. It is a general rule that an appellate court does not consider an issue not passed upon by the trial court. **Singleton v. Wulff**, 428 U.S. 106, 121 (1976).

Significantly, the City was never afforded the opportunity to argue or brief the legal sufficiency issue to the Eleventh Circuit prior to either **Nash** II or **Nash** III.

> If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. (Citations omitted).

Id. at 250-251.

Not only does the City urge that it met its prima facie burden, but the **Nash** I court agreed and held: "It is true that defendant, in its testimony, went much beyond mere 'articulation,'..." **Nash** I at 1397. (A-39). The exact evidence also supported the trial court's extensive and well-articulated conclusions on remand after **Nash I**:

> After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was job-related. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. <u>The job functions required of a fire lieutenant (combat) were developed by individuals who not only had served in the position of fire lieutenant</u> (combat) in the past, but also were now responsible for seeing

> that those who were, at present, fire lieutenant (combat) performed their jobs effectively. The make-up committee was composed of individuals intimately familiar with the work behaviors and knowledges necessary for the position of fire lieutenant (combat). Additionally, the questions were drawn to test those functions, or knowledges, from materials used to train fire lieutenants (combat).
>
> ***
>
> The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended, or used to discriminate on the basis of race. (Emphasis added).[27]

(A-59-61).

The trial court compared the process by which the City created its combat fire lieutenant's exam to the process described by the EEOC and found that the

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27. At this stage, the **Nash** I "law of the case" was that the City sufficiently presented its articulation defense. Accordingly, it would have been erroneous for the trial court, on remand, to rule otherwise.

City followed the process and created a job-related examination. Nash confirmed that the actual questions were job-related. (A-112-117).

The conclusion that the Eleventh Circuit reweighed the evidence instead of testing its legal sufficiency is inescapable when the Eleventh Circuit's own language is considered:

> The best evidence on job-relatedness of the questions came from the testimony of appellant's expert, who testified that from his statistical analysis of the test results and his study of the materials he received from the City, the test was "not capable of being validated, because there's too many items that cannot be validated..." (Emphasis added).

Nash II at 1538. (A-77).

> Just because test questions are drafted by qualified city employees does not mean that questions are job-related. (Emphasis added).

Nash II at 1537. (A-75). The Eleventh Circuit ignored the fact that the test questions were drafted according to the EEOC guidelines set forth in 29 C.F.R. Part 1607. (A-118-119). (See also A-126-128).

The Eleventh Circuit clearly substituted its findings on the weight of the evidence for the trial court's findings,[28] and failed to consider **Wards Cove** in the process as directed by the Supreme Court. By reweighing the evidence, the Eleventh Circuit went so far as to disregard its **Nash I** finding that the City exceeded its burden of production.

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28. "In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden [of persuasion]." (Emphasis added). **Nash II** at 1538 n.6. (A-78).

The Eleventh Circuit, therefore, violated this Court's directed verdict standard by undertaking a de novo review of the evidence.[29] **Nash III** should be reversed and the case remanded for entry of the trial court's judgment.

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29. In **Nash** II, the Eleventh Circuit made repeated references to the trial court being clearly erroneous. To the extent the "clearly erroneous" standard may be applicable, **Nash** II/III violated the principles of **Anderson v. Bessemer City**, 470 U.S. 564 (1985):

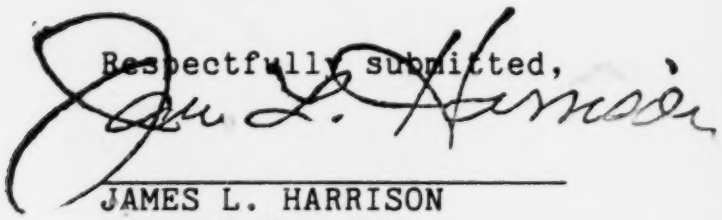
> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

Id. at 573.

CONCLUSION

For all the above reasons, petitioner prays that the United States Supreme Court grant this petition for a writ of certiorari in order to review and reverse the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in **Nash III**.

Respectfully submitted,



JAMES L. HARRISON
General Counsel

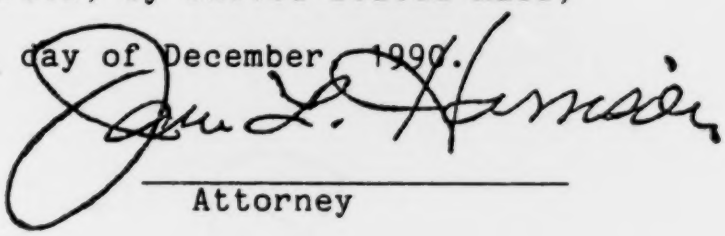
STEVEN E. ROHAN
Deputy General Counsel

LEONARD S. MAGID
Assistant Counsel

Attorneys For Petitioner
City of Jacksonville,
Duval County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this petition and the appendix to petition for writ of certiorari have been furnished to WINSTON NASH, Route 2, Box 686, Fort White, Florida 32038, Respondent herein, by United States mail, this 20th day of December, 1990.



Attorney

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Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-1016
NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

THE CONSOLIDATED CITY
OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
a municipal corporation,

Petitioner,

vs.

WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES L. HARRISON
GENERAL COUNSEL
(Counsel of Record)
STEVEN E. ROHAN and
LEONARD S. MAGID
(Counsel)
421 W. Church Street, Suite 715
Jacksonville, Florida 32202
(904) 630-4900
For Petitioner

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J--16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation,

Defendant.

OPINION AND FINAL JUDGMENT

This is an action arising under Title 42, U.S.C. §§ 1981, 1983 and 1988, and under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) *et seq.* This Court has jurisdiction pursuant to Title 28 U.S.C. §§ 1343(3) and (4). Plaintiff additionally seeks declaratory relief pursuant to Title 28 U.S.C. §§ 2201 and 2202.

Plaintiff alleges that Defendant denied him promotion to the position of fire lieutenant (combat)

in the Jacksonville Department of Public Safety, Fire Division, because of his race. The complaint prays that Plaintiff be awarded the desired position, back pay and benefits, appropriate injunctive relief, and costs and attorney's fees.

Plaintiff, WINSTON NASH, is a black male United States citizen presently residing in Jacksonville, Duval County, Florida. He has been employed with Defendant in the Department of Public Safety, Fire Division, since November, 1972. At the present time Plaintiff is employed as a firefighter/engineer with Defendant. The CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, Defendant, is a municipal corporation, and pursuant to the laws of the United States and the state of Florida, it has the power to sue and to be sued in its municipal capacity. It is a "person" under 42 U.S.C. § 1983 and its agents and employees performed all acts complained of herein under color of law. Defendant operates the Department of Public Safety, Fire Division, which has the general responsibility for fire protection and

suppression, rescue and medical assistance. It is an employer for the purposes of Title VII.

Plaintiff, who holds an associate's degree in Fire Science, a bachelor's degree and a master's degree, has applied for promotion and taken the Lieutenant (Combat) Promotion Exam three (3) times. Plaintiff first took the exam in 1975 and achieved a score of 84. He was then placed on the eligibility list; however, the eligibility list expired before he was promoted. Plaintiff then took the exam in 1978 and again in 1981 achieving scores of 69 and 69.072, respectively. Because the lieutenant (combat) exam has a cut-off score of 70 as set by the Civil Service Board, Plaintiff was not eligible for promotion following the 1978 and 1981 exams.

Following the 1981 examination Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). A notice of right to sue was issued and Plaintiff filed the present lawsuit. A bench trial was held and this opinion follows.

Title VII Claim

In the present case, Plaintiff alleges that the 1981 fire lieutenant (combat) exam had a discriminatory impact on blacks and as such discriminated against him because of his race. Plaintiff further contends that the cut-off score of seventy (70) as set by the Civil Service Board is arbitrary, that the promotional examination is not job-related and has not been validated, that less discriminatory alternatives are available and that he is qualified for the position.

In *Texas Department of Community Affairs v. Burdine,* 450 U. S. 248 (1981), the United States Supreme Court articulated a three-tier analysis to be employed by courts in evaluating a Title VII case. The Plaintiff in a cause of action brought pursuant to Title VII bears the initial burden of proving a prima facie case of discrimination; i.e., to show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Burdine, supra; Albemarle Paper*

Company v. Moody, 422 U.S. 405, 425 (1975); *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). Once the employee has established a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* This may be accomplished by "showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Albemarle Paper Company at 425, citing Griggs v. Duke Power Company,* 401 U.S. 424, 432 (1971). If the employer is able to meet the burden of showing the test it used was job-related, the employee then bears the burden of showing the employer's articulated reasons are pretext. *Albemarle Paper Company, supra; McDonnel Douglas Corporation, supra.* Such a burden would be satisfied by a showing that "other tests or selection devices, without a similarly undesirable racial effect" were available to the employer which would achieve the desired results; i.e., the promotion of qualified employees.

The Prima Facie Case

To establish his prima facie case Plaintiff principally relied on the contention that the 1981 Fire Lieutenant (Combat) Exam was not validated in accordance with the EEOC guidelines which prescribe procedures for employee selection. Specifically, the guidelines delineate standards for validity studies of employment-related tests. Plaintiff's expert, Dr. Martin M. Shapiro, conducted an extensive study on the material used to validate the 1981 examination. Dr. Shapiro's testimony revealed that he had conducted an item-by-item study of the test performance of each of the candidates, black and white, who took the examination to determine if Defendant's determination that the test was content valid was proper. Dr. Shapiro, who was familiar with the EEOC guidelines for test validation, reviewed material pertinent to the 1981 Fire Lieutenant (Combat) Exam, including the deposition of Gladys Darlene Horne, the personnel examiner in charge of assembling the 1981 exam, a statistical analysis

composed by Defendant, the reading material on the reading list given candidates for preparation for the examination and the item-by-item test performance of each of the candidates. Although he did not have a copy of the 1981 exam questions which are administered, Dr. Shapiro testified that from the material given to him he could determine whether the test was content-valid based on a statistical analysis of the answers rendered by each candidate. It is clear from the evidence that Dr. Shapiro engaged in an extremely detailed, exacting study of the test results with regard to both blacks and whites. Dr. Shapiro testified that in his opinion the test was not content-valid and that based on his results the conclusion could not be made that the examination selected persons who best performed on the exam, much less those who performed or would have performed best on the job. In Dr. Shapiro's opinion the 1981 exam was incapable of being validated because a large number of questions were not valid, acceptable questions accurately reflecting what was required on the job.

The evidence submitted at trial also revealed the examination administered in 1981 had an adverse impact on blacks. Gladys Darlene Horne, a personnel examiner with Defendant and the person in charge of the makeup and administration of the 1981 examination testified that under the EEOC guidelines regarding the four-fifths rule, 29 C. F. R 1607.4(D), the 1981 exam had had a significant adverse impact. Under the four-fifths rule, "a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty per cent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact . . . ." 29 C.F.R. 1607.4(D).

At trial, Plaintiff offered the results of the 1981 exam. Only three (3) of the twenty (20) blacks who had taken that test for the position of fire lieutenant (combat) had passed, while fifty-seven (57) of the one hundred (100) whites taking the same test has passed. Under the four-fifths rule approximately nine (9) of the twenty (20) blacks taking the

examination would have had to pass the exam for the selection rate of the blacks to meet the four-fifths requirement. This did not occur; therefore, the test will be regarded as having an adverse impact on blacks.

This Court finds that based on the statistical and other evidence submitted at trial that Plaintiff has sufficiently sustained his burden of establishing a prima facie case of discriminatory impact of Defendant's 1981 exam.

Defendant's Case

Once the racially adverse impact of an examination is established, the burden of proof shifts to the Defendant-employer to come forward with a legitimate justification for the discriminatory effect; i.e., that the test was job-related. *Albemarle, supra.* "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee . . . . The burden that shifts to the Defendant, therefore, is to rebut the presumption of discrimination . . . ." *Burdine, supra,* at 254.

In order to rebut the presumption of discriminatory practice, the employer must show the job performance validity of its practices. *Washington v. Davis,* 426 U.S. 229 (1976). This burden is not met merely by the establishment of som rational basis for the practices, rather, the test must be validated. *Washington, supra.* There is no single method for validating employment tests for their relationship to job performance. One acceptable method, as supported by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals guidelines, is to demonstrate the test is structured to measure the degree to which job applicants possess the characteristics which have been determined to be important in successful job performance. The process involves ascertaining "the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." Id. at 247 (footnote omitted). This method, known as the

"content validity" method, was employed by Defendants in the present case as a means for validating the 1981 examination.

The Defendants presented evidence that in constructing the 1981 fire lieutenant (combat) exam the following procedure was employed. Following a request from the Fire Division that a test be administered, the personnel department of Defendant through a personnel examiner, Gladys Darlene Horne, organized the construction of the examination. Ms. Horne, who had been employed with Defendant as a personnel examiner for approximately seven (7) years, testified that she was familiar with the EEOC guidelines and that the 1981 examination measured knowledge based upon work behaviors.

In developing the test, Ms. Horne assembled a makeup committee which she testified would have ideally been composed of one person currently serving in the classification for which the test is being constructed, here, a lieutenant, and two

supervisors. In this instance, however, no lieutenant was selected for the committee, and Ms. Horne was assigned two (2) chiefs and one (1) captain to assist her in constructing the exam. The evidence shows, however, that each of the persons on the makeup committee had at one time held the position of lieutenant in combat and possess knowledge regarding the position. Mr. Gary F. Keys, the Chief of Operations for the Jacksonville Fire Department and the individual who selected the three (3) persons to serve on the makeup committee because they were qualified individuals in terms of training and study material, they had been on the job for a while and were familiar with testing procedures.

The committee then met and came up with a list of work behaviors and work knowledge which they felt were necessary for the position of Fire Lieutenant (Combat). The makeup committee's expertise was used to develop the work behaviors and the committee drew on their knowledge of what functions a fire lieutenant was performing on the job

at that time in arriving at the work behaviors. Although none of the individuals on the committee were, at the time the exam was constructed, working in the position of fire lieutenant (combat), each was in a supervisor capacity which enabled him to be currently and extremely familiar with the job functions of a fire lieutenant in combat.

Once the work behaviors were developed, the behaviors were compared to the job specification for fire lieutenant to determine if the job specification was up-to-date. The work behaviors were then analyzed to determine which knowledge were necessary for the particular behavior required for the position, and potential questions were developed to test the knowledge the committee felt were necessary for the position of fire lieutenant in combat. The committee themselves composed the questions, using fire manuals used for training and study materials available to the fire fighters. The committee tested only those knowledge they determined could be tested for in a written method. Each member of

the committee then rated each potential question as to how important the knowledge was to the job; that is, how each expert felt about the job-relatedness of each question. Those that were determined by the job experts to not be job-related were not used. The questions were then checked for proper grammatical construction to assure the question properly tested knowledge rather than reading comprehension. Ms. Horne, the personnel examiner, testified that she used her own knowledge, derived from various textbooks and workshops, to word the question in a grammatically correct manner.

The test was then administered. Following grading the candidates were divided into two groups: those who passed and those who failed. The cut-off score used for this examination, as set forth by the Civil Service Board, was seventy (70) per cent. Each candidate who received a score of seventy (70) per cent or higher then received seniority points which were added to his score. The candidates were then ranked, the candidate with the highest score being

ranked number one. Fire lieutenants were then promoted from the list in order of their scores, or rank, the number one candidate being promoted first.

Of the sixty (60) persons who passed the examination, nineteen (19) were promoted to fire lieutenant (combat) before the list's eligibility expired. All of those promoted were white males; no blacks were promoted. The evidence at trial showed that although three blacks were among the sixty (60) eligible candidates, they did not rank high enough among the sixty (60) candidates to have been reached for promotion to the nineteen (19) positions which came open during the list's eligibility.

The evidence further disclosed that the exam questions were composed from study materials that were available to the firefighters. The Department provided a list of materials that would be used for the examination to the firefighters. Plaintiff himself testified that although he was sure the questions were aimed at job relatedness but missed the point, as far as he knew the questions came from

the study material and that he felt that the material was job related.

After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was content-valid. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. The job functions required of a fire lieutenant (combat) were developed by individuals who not only had themselves served in the position of fire lieutenant (combat), but who were responsible for seeing that those who were performed their jobs effectively. As such, the makeup committee was composed of individuals intimately familiar with the work behaviors and knowledge necessary for the position of fire lieutenant (combat). Additionally, the questions were drawn to test those functions, or knowledge of the position from materials used to train fire fighters which were available to each fire fighter. Plaintiff's own testimony was that the material was job related.

There was a noticeable lack of evidence that the examination was not job-related. Plaintiff's expert, who had not seen the examination, never correlated the test with successful job performance, but rather correlated the pass-fail rate of whites versus blacks. This was certainly evidence of the disproportionate impact of the test, but fails to rebut the Defendant's contention that the test was content valid. The test was developed by experts in the field from available materials directly related to job performance and the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended or used to discriminate on the basis of race.

This Court finds, then, that the 1981 examination was content-valid; that is, that the "qualifying test [was] appropriate for the selection of qualified applicants for the job in question." *Washington, supra,* at 247. Those who performed well on the examination would be expected to be the best-qualified for the position of fire lieutenant in

combat because they demonstrated better knowledge of the behaviors and knowledge required in such a position than those who scored poorly.

Validation suffices to refute statistical evidence that a test has had disproportionate racial impact. *Washington v. Davis,* 426 U.S. 229 (1976). This Court finds that Defendant has successfully refuted Plaintiff's prima facie case by showing the test was valid. Defendant has carried its burden of production and the presumption raised by the prima facie case is rebutted. "The employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Burdine, supra,* at 256 (citations omitted). **Plaintiff** at all times retains the burden of persuasion. *Id.* See also *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978).

Once the Defendant has produced evidence which rebuts Plaintiff's prima facie case, the Plaintiff must show the Defendant's asserted justification was pretext or not worthy of credence.

Burdine, supra. Plaintiff attempted to meet this burden by showing that other selection methods were available to Defendants. In this respect Plaintiff falls far short of carrying this burden of persuasion.

In rebuttal, the only evidence presented was testimony by Plaintiff himself. Plaintiff testified mainly to the effect that he believed the Fire Department had discriminated against him as well as seventeen 17 other blacks in its promotion procedures. There was absolutely no evidence presented which persuades this Court that Defendant's employment practice with regard to its promotional examination, although discriminatory in effect, is not worthy of credence or that other alternative, less discriminatory devices were available but were not used. To the contrary, there was evidence submitted, albeit by the Defendant, that alternative methods had historically been used and/or considered but which were not used in this case for legitimate reasons. In fact, in this Court's opinion such

alternative methods would have afforded Defendants more of an opportunity to discriminate against blacks.

There was testimony that if a performance examination had been given it would have necessitated the starting of one hundred twenty fires so that each candidate could be rated on his ability to put out one fire. Such a rating procedure could lead to very subjective results, an end the objective exam was designed to prevent.

A second alternative selection procedure would have been to conduct an unassembled exam, which merely entails the rating of candidates based on their education or experience. In this Court's opinion such rating could, again, lead to subjective results. Further, because a candidate possesses a degree in fire fighting, or has experience as a fire fighter, does not necessarily mean that the candidate possesses the knowledge necessary to the successful performance of fire lieutenant in combat.

Additionally, although there was testimony that composing an eligible list on a pass-fail

basis rather than a ranking basis would have had less adverse impact in terms of selection, the evidence clearly showed that such a change would have only slightly altered statistically the adverse impact of the exam; there would not have been significantly less adverse impact.

Plaintiff's burden under Title VII is to persuade this Court by a preponderance of te evidence that Defendant discriminated against him. In this regard Plaintiff has failed. Title VII prohibits discrimination in employment based upon race, sex and national origin. However, Title VII "does not demand that an employee give preferential treatment to minorities or women." *Burdine, supra,* at 259. The statute was not designed to diminish traditional management prerogatives, see *Steelworkers v. Weber,* 443 U.S. 193 (1979), nor does it "require an employer restructure his employment practices to maximize the number of minorities and women hired." *Burdine, supra,* at 259, citing *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978).

Accordingly, this Court finds, based on the evidence submitted as a whole and the testimony presented to this Court at trial, that Plaintiff has failed to sufficiently sustain his burden of persuasion under Title VII.

Sections 1981 ad 1983 claims

Plaintiff also brings a claim pursuant to 42 U.S.C. §§ 1981 and 1983, which guarantee equal rights under the law and prohibit the deprivation of rights secured by the Constitution and laws of the United States by anyone acting under color of state law, respectively. Defendant is subject to suit under both Section 1981 and 1983, and a municipality has been defined as a "person" under 42 U.S.C. § 1983.

Plaintiff alleges Defendant denied him his rights as secured by 42 U.S.C. §§ 1981 and 1983 by discriminating against him in its employment practices. Under Sections 1981 and 1983, a Plaintiff charging racial discrimination must prove that the alleged discrimination was purposeful or intentional. *Washington, supra; Williams v. DeKalb County,* 582 F.2d 2 (5th Cir. 1978); *Williams v. Anderson,* 562 F.2d

1081 (8th Cir. 1977). Although, in Section 1983 claims, state of mind is not an element of the cause of action, evidence of discriminatory intent must at least be inferred from Defendant's conduct. Such an inference establishes a prima facie case of discrimination under §§ 1981 and 1983. *Ramirez v. Sloss,* 615 F.2d 163 (5th Cir. 1980). Procedurally, actions brought pursuant to §§ 1981 and 1983 parallel those brought pursuant to Title VII.

In this case Plaintiff fails on his claims brought pursuant to §§ 1981 and 1983. Plaintiff failed to establish in any way whatsoever that Defendant intentionally or purposefully discriminated against him. There was not one shred of evidence submitted that such purposeful discrimination occurred. Neither was there evidence from which it could be inferred that Defendant's practices were purposefully discriminatory. As such, this Court finds Plaintiff fails on his claims brought pursuant to §§ 1981 and 1983.

Accordingly, judgment is hereby entered in favor of defendant, THE CONSOLIDATED CITY OF

JACKSONVILLE, DUVAL COUNTY, FLORIDA, and against the Plaintiff, WINSTON NASH, and the Defendant shall go hence without day.

DONE AND ORDERED in Chambers at Jacksonville, Florida this _____ day of June, 1984.

s/ John H. Moore, II

UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

Opinion of the Eleventh Circuit, Filed June 25, 1985

Cite as 763 F.2d 1393 (1985)

Winston NASH, Plaintiff-Appellant,

v.

The CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, etc., Defendant-Appellee.

No. 84–3502.

United States Court of Appeals, Eleventh Circuit.

June 25, 1985.

Fireman brought suit against city alleging that city discriminated against him by failing to promote him to fire lieutenant in combat division because he did not pass promotion examination. The United States District Court for the Middle District of Florida, John H. Moore, II, J., entered judgment for city, and fireman appealed. The Court of Appeals, Nichols, Senior Circuit Judge, sitting by designation, held that remand of Title VII disparate impact case was required, where trial court appeared to apply law controlling in disparate treatment cases which requires employer only to articulate some legitimate, nondiscriminatory reasons for its actions, rather than placing upon city burden of persuasion that examination used to select lieutenants for fire department was business necessity.

Vacated and remanded.

Fay, Circuit Judge, filed specially concurring opinion.

1. Civil Rights ⇐45

Federal Courts ⇐858

Finding of discrimination is one of ultimate fact, and Court of Appeals will reverse finding only if it is clearly erroneous, or if reversible error occurred in applying law.

2. Federal Courts ⇐891

When trial has taken place and parties have had full opportunity to provide their evidence and arguments, Court of Appeals will not reverse for harmless errors and will review ultimate question of discrimination vel non.

3. Civil Rights ⇐9.10

Test for claim asserting disparate-impact theory of discrimination under Title VII does not require specific intent to discriminate. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐43

In disparate impact cases, employer must do more than articulate legitimate, nondiscriminatory reason for its action, employer bears burden of persuasion that challenged action was business necessity.

5. Federal Courts ⇐937

Remand of Title VII disparate impact case brought against city by fireman who was denied promotion to fire lieutenant when he did not pass promotion examination was required, where there existed glaring weaknesses in cases on both sides, and trial court appeared to apply law controlling in disparate treatment cases which requires employer only to articulate some legitimate, nondiscriminatory reasons for its actions, rather than placing upon city burden of persuasion that examination used to select lieutenants for fire department was business necessity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Deitra Micks, Jacksonville, Fla., for plaintiff-appellant.

William L. Allen, Thomas E. Crowder, Steven E. Rohan, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and NICHOLS *, Senior Circuit Judge.

NICHOLS, Senior Circuit Judge:

This appeal arises from the claims of a fireman, Winston Nash, as an individual,

that the City of Jacksonville (City or Jacksonville) discriminated against him by failing to promote him to Fire Lieutenant (lieutenant) in the Combat Division because he did not pass a 1981 promotion examination. The United States District Court for the Middle District of Florida held that Nash did not prove discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, under the "disparate impact" theory, even though it can be unintentional on the employer's part. (Nash also alleged claims under 42 U.S.C. §§ 1981 and 1983, but the court held that any recovery under these laws would require discriminatory intent which had not been shown. Nash has not appealed the decision on these issues.)

This court has jurisdiction under 28 U.S.C. § 1291. We conclude that the district court's ultimate finding, that discrimination was not established, is clearly erroneous being based on a mistake of law, and we remand for further consideration.

I

District Court Proceedings

As established at trial, the facts are as follows: Winston Nash, a black fire engineer employed by the City of Jacksonville since November 1972, has applied for promotion to the position of lieutenant three times. A written examination is used by the Fire Department for promotion to lieutenant; Nash scored an 84 on the examination in 1976, a 69 in 1978, and a 69.072 in

1981. The Civil Service Board has set an automatic cut-off score of 70 for all employment examinations given by Jacksonville. Thus Nash was placed on the promotion eligibility list of the 1976 examination only. Those who had attained the eligibility list were then ranked based on a composite score which is the sum of the test score and seniority points. Nash was not promoted after the 1976 test since he did not place high enough on the list to be selected prior to the list's supersession.

Evidence was adduced at trial regarding discrimination at the Fire Department and the manner in which the 1981 test was prepared. It was established that there have been no blacks in the positions of lieutenant or above in the Combat Division. The trial judge found that only three of the 20 blacks who had taken the test had passed, while 57 of the 100 participating whites had passed. None of the three blacks placed on the list were actually promoted to the 19 vacancies which were ultimately filled; the blacks were not high enough on the list to be placed. Under the four-fifths rule, which states that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact," 29 C.F.R. § 1607.4(D) (EEOC guidelines), as well as statistical evidence produced by Nash's expert witness, the court found that a case of

prima facie discriminatory impact had been stated. The court then considered evidence that there was a legitimate justification for the discriminatory effect. Turning to whether the test was content-valid, and thus job-related, the court found that Jacksonville's preparation of the test was acceptable. The test was prepared under the supervision of a personnel examiner who had been employed by Jacksonville for approximately 7 years and who was familiar with the EEOC guidelines. The examiner, Ms. Horne, testified that the test measured knowledge based upon work behaviors. Ms. Horne explained that a committee was formed to prepare the examination, which was composed of two chiefs and one captain. Ideally a lieutenant would have been included in the committee, but none were available; however, the committee members had all once been lieutenants. The court found that each of those in the committee did possess knowledge regarding the lieutenant position.

The committee developed questions for the examination by listing work behaviors and knowledge they deemed necessary for the position; the behaviors were then compared to the job specification for the lieutenant position to determine if the specification was up-to-date. The behaviors were analyzed to determine which knowledges were necessary for a particular behavior, and questions were developed to test these areas of knowledge. The committee composed the questions using the fire manuals

and the study materials. Although the committee noted that supervisory ability was necessary for the position, no questions in this area were prepared since the committee felt that supervision could not be tested by a written examination. As questions were prepared, each committee member rated each potential question as to the importance of the tested knowledge to the job. After the final questions were selected based on their job-relatedness, the examiner reworded the questions so they would be simply stated and grammatically correct. Evidence was also produced, through Nash's testimony, that the questions were aimed at job-relatedness but, at least in Nash's opinion, missed the point because they were poorly constructed.

The court determined that the testimony of Dr. Shapiro, Nash's expert, did not bear on the issue of job-relatedness. That expert correlated the pass-fail rate of whites versus blacks, and analyzed the pattern of participants' answers as a whole. The expert concluded that the test was a poor one as some of the questions showed a disparate impact. The expert also found it particularly revealing that some questions were correctly answered by almost all, and some questions were predominantly answered correctly by those who scored poorly on the test as a whole. Thus, the expert concluded the test could not be job-related because it did not actually test anything. The court considered the expert's testimony and found it probative evidence of the disproportionate impact of the test, but not relevant to job-relatedness because the expert

had not seen the examination and had never correlated the test with successful job performance. The questions asked, or samples thereof, were not in the record. While Jacksonville did not produce direct evidence that the test scores correlated with successful job performance, several witnesses stated that it was their belief, based on their experience supervising and their experience composing the test, that there was a correlation. The method of test preparation was also indirect evidence of job-relatedness. (The City does have a probationary period for those promoted; during this time the Fire Department checks to see that those promoted are performing well. The Fire Department appears satisfied with the performance of those promoted. It has not, however, determined directly whether those not promoted could have performed.)

While not specifically discussed by the trial judge in his opinion, the City also produced evidence to rebut the expert's conclusions. A former personnel examiner for the City, whose duties had included reviewing the computer-produced statistical data from the 1981 test, testified that the statistics produced might not accurately reflect nonjob-relatedness because they were formulated based on a sample size of only twenty, the twenty blacks who participated in the test. The employee testified that the statistics might be useful to flag questions with possible problems, but consideration

of the questions was necessary to determine if they were nonjob-related. Mr. Rodeheaver, the employee, testified that he reviewed Nash's answers and found the answers indicated that Nash's mistakes were generally in specific areas of knowledge. (For example, Nash did well on questions pertaining to water distribution and radio signals, but poorly on questions pertaining to first aid.) Mr. Rodeheaver also testified that many of the questions Nash missed were ones which did not show any adverse impact, and that Nash, like the majority of the participants, often chose a commonly selected wrong answer. Mr. Rodeheaver also testified that there was a quirk in the statistical methodology of Nash's expert.

The court concluded that the City had shown that the test was content valid and therefore job-related and then found that Nash had not shown there were less discriminatory ways to meet the City's business necessity. The court considered the alternatives that Nash had suggested during his case-in-chief and found that they would afford the City with a greater opportunity to discriminate than present with the test. The trial judge concluded that ultimately Nash had not proven by a preponderance of the evidence that the City had discriminated against him.

II

Discussion

[1, 2] The finding on discrimination is one of ultimate fact, and this court will reverse the finding only if it is clearly erroneous, or if reversible error occurred in applying the law. In this case, consideration of the court's subsidiary findings is made somewhat more difficult as the trial judge applied some case law developed for disparate treatment cases in analyzing his disparate impact problems. Thus the legal analyses of these theories are intermingled. Still, when a trial has taken place and the parties have had the full opportunity to provide their evidence and arguments, this court will not reverse for harmless errors and will review the ultimate question of discrimination vel non. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). All in all, we think that even so, a remand is necessary so the judge may render fact findings so stated that they are not infected by incorrect assumptions as to law.

[3] Appellant states that he has a claim both under the "disparate impact" and the "disparate treatment" standards. The former test, under Title VII, does not require a specific intent to discriminate and therefore is easier to apply and more appropriate when, as here, the employer has a facially neutral method of selection which, as applied, has a discriminatory "impact."

Connecticut v. Teal, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982). The latter test, when under Title VII, may be more appropriate when specific intent to discriminate is shown either directly or by inference. In reality, as we view the case, the only showing of intent is the inference that people intend the inevitable consequences of their acts, *i.e.*, that in using a method of selection that was invariably fatal to black candidacies, appellee must have intended no black to succeed. In the circumstances of this case, such an inference could be drawn only if the "disparate impact" was too obvious to be overlooked, and in that event, inquiry into intent would be superfluous. Appellant therefore rightly states that "impact" is the principal issue, and we regard it as being for practical purposes the only one. The court, in any event, made a specific finding as to "intent" only under the §§ 1981 and 1983 claims which are not before us.

[4] Appellant attacks the holding below on the ground that the court stated (R. 170) that in an "impact" case the employer need only "articulate some legitimate, non-discriminatory reason for its actions," citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). But this is not the rule of the above cases, or any others, in an "impact" situation involving employment tests under Title VII. It is the rule in intent cases only. The Court in *Burdine*,

450 U.S. at 252 n. 5, 101 S.Ct. at 1093 at n. 5, expressly distinguishes the "impact" situation. In an "impact" case the employer must do more than "articulate." He bears the burden of proving or "persuasion," that the examination was a "business necessity." *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir.1984); *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir.1982).

[5] Where, as here, there exist glaring weaknesses in the cases of both sides, the difference between a burden of "articulation" and of "persuasion" may be a momentous one, and it is not just a question of who goes forward, which may cease to be important when all the testimony is in. The observations of the trial court repeatedly in its opinion indicate that the defendant need only say something: "if he simply explains what he has done" (R. 179). It is also said in the same breath that defendant "successfully refuted plaintiff's prima facie case by showing the test was valid," but in context this may only mean that an "articulation" sufficed to make a successful refutation. The court says (R. 179), plaintiff at all times retains the burden of persuasion. It is true that defendant, in its testimony, went much beyond mere "articulation," and the court recited this testimony with every indication of believing it, yet the court at 180–181 re-

peatedly states that plaintiff has failed to persuade the court "by a preponderance of the evidence." The idea seems to be that mere "articulation" shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to "impact" employment test cases that we have cited.

Had the court made numbered separate findings of fact and conclusions of law, we might not be in such perplexity. The discursive mode it adopted, while permissible under the rules, leaves the reader frequently in the dark as to the legal assumptions that may underlie any particular fact assertion. We have considered whether we could hold that the "articulation" assertions were harmless error because they could be severed from the most relevant fact findings. We conclude that this mode of rescuing the decision below is not available.

We further express wonder that any court should attempt to determine whether a written examination was "job-related" and "content-valid" without having before it the questions asked of the applicants. The court, though accepting as true the testimony of Dr. Shapiro, plaintiff's expert, as to discriminatory "impact," rejected it as to "content-validity," in part because Shapiro too had not seen the examination. It would indeed seem that it is equally as hopeless for an expert to try to form an opinion in such a matter, without this necessary aid, as it is for the judge to adjudi-

cate. Had the burden of persuasion as to "content-validity" been placed where it should have been, on defendant, we think defendant might have felt it incumbent to produce the examination questions. They were successfully withheld from discovery on the ground of secrecy, in rulings not before us for review, but we hope that upon our remand, the questions will somehow find their way before the court.

Appellant finally says that the finding that Nash has failed to sustain his burden under Title VII is clearly erroneous where the district court was already predisposed against "these kinds of cases." The repeated use of quotation marks suggests the court actually used these words, but it did not. We read this argument to allege bias against Title VII plaintiffs on the part of the district judge, though this complaint is shrouded in a decent obscurity.

Counsel for appellants generally do better to confine themselves to actual error in the record rather than broad general charges of bias. The suggestion here is, in effect, we should supersede the "clearly erroneous" standard and, in effect, determine that all findings were "clearly erroneous" and retry the case *de novo* on the record. This kind of suggestion is not very helpful, because it lacks support in the federal rules. It reads like a disgruntled loser cursing the court, as all losers are entitled to do, but on the courthouse steps rather than in appellate briefs. If counsel really and truly believes the trial court is

biased, there are measures counsel can and should take, but they were not taken here.

The incident which of record establishes, in counsel's eyes, that the court is biased, not only against Title VII plaintiffs, but against her personally, occurred at a pretrial conference shortly before the actual trial started. She was seeking a continuance for further discovery. The judge denied the continuance and in doing so, was sharply critical of her conduct of this case and other cases. He said she made a practice of filing suit whenever a black person was "discharged or doesn't get a job" without adequate or any investigation of the merits, hoping to establish the facts later and, presumably, dismiss if the facts were insufficient. He thought she should "have a good case before you file the case." In this particular suit she had had anyway five months for discovery after filing and not used them, he said.

This view of the ethical duties of counsel filing a lawsuit is not before us for review and we do not pass judgment upon it. It is, however, an understandable view to be entertained by anyone dismayed at the flood of litigation in the federal courts. It would not reflect the existence of bias or prejudice here unless the judge applied it only to some particular category of plaintiffs or attorneys and there is nothing to convince us that he did. He could perhaps have reflected more on the likelihood that what he said would be misunderstood by the target of his disapprobation, and by

spectators. He, just as counsel, had his established and proper ways to take action in case he perceived unethical conduct before him, and, he resorted to an open court tongue-lashing, a mode which, justified or not justified, still is adopted at some peril.

Accordingly, we decline the invitation to hold all the fact findings "clearly erroneous" and find in it no basis for disturbing the judgment below, which, however, cannot be sustained for other reasons.

Conclusion

The judgment below is vacated and the cause is remanded for further proceedings in accordance with this opinion.

VACATED AND REMANDED.

FAY, Circuit Judge, concurring specially:

The majority bases its holding upon a conclusion that the trial judge applied the wrong legal test to the plaintiff's "disparate impact" claim. My reading of the trial judge's ruling does not leave me with such an impression. I concur, however, because any reasonable doubt in this regard can and should be eliminated.

* Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Opinion and Final Judgment of the District Court, Filed May 4, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, etc..

Defendants.

OPINION AND FINAL JUDGMENT

The above-styled cause is before the Court upon remand from the United States Court of Appeals, Eleventh Circuit. The Eleventh Circuit instructed this Court to apply the law controlling the disparate-impact theory of discrimination under Title VII, 42 U.S.C. §2000e *et seq.* *Nash v. Consol. City of Jacksonville, Duval Cty.*, 763 F.2d 1393 (11th Cir. 1985).

Therefore, this Court ordered both parties to file new proposed findings of fact with citations to

the trial transcript, and conclusions of law in accordance with the Eleventh Circuit's decision. The Defendant filed revised findings of fact and conclusions of law. In lieu of new proposals, however, the Plaintiff merely filed a copy of his appellate brief. On December 15, 1986, the Plaintiff's attorney moved to withdraw. This Court granted said motion, on January 15, 1987 and ordered Plaintiff to obtain the appearance of substitute counsel within thirty days. To date Plaintiff has not complied with this order. Neither party requested a trial *de novo* or oral argument prior to this Court rendering its decision in compliance with the mandate of the Eleventh Circuit. Accordingly, the Court will proceed on the basis of the trial record and on the parties' submissions.

Plaintiff, WINSTON NASH, is a black male, United States citizen residing in Jacksonville, Duval County, Florida. Defendant, THE CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, is a municipal corporation. Pursuant to the laws of the

United States and the State of Florida, Defendant has the power to sue and be sued in its municipal capacity. It is a "person" under 42 U.S.C. § 1983 and its agents and employees performed all acts complained of under color of law. For the purposes of Title VII, Defendant is an employer. This Court has jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4). Plaintiff additionally seeks declaratory relief pursuant to 28 U.S.C. § 2201 and § 2202.

Plaintiff alleges that Defendant discriminated against him in his employment because of his race. He originally brought the action under Title VII, 42 U.S.C. § 2000e *et seq.* and under 42 U.S.C. §§ 1981, 1983 and 1988. At trial this Court held that recovery under 42 U.S.C. §§ 1981, 1983 and 1988 was precluded because Plaintiff failed to show discriminatory intent. Such a showing is required under those statutes. Plaintiff did not appeal the decision on these issues and thus, these issues are not before the Court now.

Statement of the Case

Plaintiff has been employed by Defendant in the Department of Public Safety, Fire Division since November 1972. At present, Plaintiff is employed as a firefighter/engineer. He holds an associate's degree in Fire Science, a bachelor's degree and a master's degree.

On three different occasions Plaintiff attempted to be promoted to the position of fire lieutenant (combat) in the Jacksonville Department of Public Safety, Fire Division by taking the Lieutenant (Combat) Promotion Examination. He first took the examination in 1975 and achieved a score of 84. He was placed on the eligibility list, however, the list expired before he was promoted. Plaintiff took the examination again in 1978 and also in 1981, achieving scores of 69 and 69.072, respectively. Because the cut-off score on the examination is set at 70 by the Civil Service Board, Plaintiff was not eligible for promotion after either the 1978 or the 1981 examination.

Following the 1981 examination, Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission (the EEOC). A notice of right to sue was issued from the EEOC and Plaintiff filed suit in this Court. Plaintiff alleged that Defendant denied him promotion to the position of Fire Lieutenant (combat) in the Jacksonville Department of Public Safety, Fire Division because of his race. The complaint prayed that Plaintiff be awarded the desired position, back pay and benefits, appropriate injunctive relief, costs and attorney's fees. A bench trial was held and this Court found that Plaintiff did not sufficiently sustain his burden of persuasion under Title VII. Plaintiff appealed and the Eleventh Circuit vacated and remanded the cause to this Court.

Findings of Fact

The evidence submitted at trial revealed that the Lieutenant (Combat) Promotion Examination administered in 1981 had an adverse impact on blacks. Gladys Darlene Horne, a personnel examiner

with Defendant and the person in charge of the creation and administration of the 1981 examination, testified that under the EEOC guidelines, the 1981 examination was in violation of the four-fifths (4/5) rule, 29 C.F.R. 1607.4(D). Under the four-fifths rule, "a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) or eighty per cent (80%) of the rate for the group with the highest rate will generally be regarded by federal enforcement agencies as evidence of adverse impact . . . ." 29 C.F.R. 1607.4(D).

The results of the 1981 examination were offered at trial. Only three (3) of the twenty (20) blacks who had taken the test for the position of fire lieutenant (combat) passed. Fifty-seven (57) of the one hundred (100) whites taking the same examination passed. To meet the requirements under the four-fifths rule, nine (9) of the twenty (20) blacks taking the examination would have had to pass.

The City presented evidence concerning the construction of the 1981 examination. Following a request from the Fire Division that a test be administered, Defendant's personnel department, through personnel examiner Gladys Darlene Horne, organized the construction of the examination. Ms. Horne, who had been employed with Defendant as a personnel examiner for approximately seven (7) years, testified that she was familiar with the EEOC guidelines and that the 1981 examination measured knowledge based upon work behaviors.

In developing the test, Ms. Horne assembled a makeup committee which, she testified, would have ideally been composed of one (1) person currently serving in the classification for which the test was being constructed. In this instance, however, no lieutenant was selected for the committee, and Ms. Horne was assigned two (2) chiefs and one (1) captain to assist her in constructing the examination. The evidence showed that each of the persons on the committee had at one time held the position of

lieutenant in combat and possessed knowledge regarding the position. Mr. Gary F. Keys, the Chief of Operations for the Jacksonville Fire Department and the individual who selected the three persons to serve on the makeup committee, testified that he recommended the persons on the makeup committee because they were qualified individuals in terms of their knowledge of training and study material. Mr. Keys explained that their qualifications arose because they had been on the job for some time and also were familiar with testing procedures.

The committee met and came up with a list of work behaviors and work knowledge which they felt were necessary for the position of Fire Lieutenant (Combat). The makeup committee's expertise was used to develop the work behaviors, and the committee drew on their knowledge of what functions a fire lieutenant performed on the job in arriving at the work behaviors. Although none of the individuals on the committee were, at the time the examination was constructed, working in the

position of fire lieutenant (combat), each was in a supervisory capacity which enabled him to be extremely familiar with the job functions of a fire lieutenant in combat.

Once the work behaviors were developed, the behaviors were compared to the job specifications for fire lieutenant to determine if the specification was up to date. The work behaviors then were analyzed to determine which knowledge were necessary for the particular behavior required for the position. After the analysis, potential questions were developed to test the applicant's knowledge.

The committee composed the questions after referring to fire manuals used for training and study materials available to the firefighters. The committee tested only those knowledge it determined could be tested in a written method. Each member of the committee then rated each potential question as to how important the knowledge was to the job. Those questions that the

job experts determined were not job-related were discarded. The questions ultimately chosen for the examination were checked for proper grammatical construction to assure that they properly were testing knowledge rather than testing reading comprehension. Ms. Horne testified that she used her own knowledge, derived from various textbooks and workshops, to word the questions in a grammatically correct manner.

The evidence further disclosed that the exam questions were composed from study materials that were available to the firefighters. The Department provided a list of materials that would be used for the examination. The Plaintiff himself testified that, as far as he knew, the questions came from the study material and that he felt that the material was job-related.

However, the Plaintiff argued that the 1981 Fire Lieutenant (Combat) Examination was not validated in accordance with EEOC guidelines. Specifically, the guidelines delineate standards for

validity studies of employment-related tests. Plaintiff's expert, Dr. Martin M. Shapiro, conducted an extensive study on the material used in order to validate the 1981 examination. Dr. Shapiro's testimony revealed that he conducted an item-by-item study of the test performance of each of the candidates, black and white, who took the examination. Dr. Shapiro, who was familiar with the EEOC guidelines for test validation, reviewed material pertinent to the 1981 Fire Lieutenant (Combat) Examination, including the deposition of Ms. Horne, the reading material on the reading list given candidates for preparation for the examination, a statistical analysis composed by Defendant, and the item-by-item test performance of each of the candidates. Although he did not have a copy of the 1981 examination, Dr. Shapiro testified that from the material he received, he could determine whether the test was content-valid based on a statistical analysis of the answers rendered by each candidate. Dr. Shapiro engaged in an extremely

detailed, exacting study of the test results of both blacks and white. In his opinion the test was not content-valid, and the examination would not necessarily select persons who best performed on the examination, or who would perform best on the job.

Defendant's expert, Robert Rodehaver, also evaluated the test results by reviewing each question missed. Mr. Rodehaver concluded that 70 out of 97 test questions showed no adverse impact.

Conclusions of Law

Plaintiff originally alleged that he had claims under both the disparate-treatment and the disparate-impact standards under Title VII. However, one claiming disparate treatment must show that Defendant had the specific intent to discriminate. After the bench trial, this Court found that Plaintiff was not able to show Defendant's specific intent to discriminate. This finding was not disturbed by the Eleventh Circuit. *Nash,* 763 F.2d at 1397. Thus, the appropriate issue is whether the disparate impact of

the 1981 Lieutenant (Combat) Promotion Examination violated Title VII.

In *Walker v. Jefferson County Home,* 726 F.2d 1554 (11th Cir.1984), the Eleventh Circuit, citing Connecticut v. Teal, 457 U.S. 440 (1982), *Albermarle Paper Co. v. Moody,* 422 U. S. 405 (1975),and *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), recited the appropriate burdens of going forward and of proof and persuasion in disparate-impact cases. These burdens are:

1. The Plaintiff must establish that a facially neutral employment practice has a discriminatory impact upon a protected class.

2. The Defendant-employer then has the burden of proving by the preponderance of the evidence that the neutral practice was a business necessity or job-related. A neutral practice is a business necessity and job-related if it bears "a manifest relationship to the employment in question."

3. When an employer establishes job-relatedness, the burden of proof then shifts to the employee to show the availability of other selection devices with a lesser adverse impact which would serve the employer's needs, or to show that the employer was using the practice as a pretext for discrimination.

1. **Plaintiff's Prima Facie Case**

Plaintiff successfully established a prima facie case of discriminatory impact upon a protected class. As stated earlier, the evidence showed that twenty (20) blacks took the 1981 Fire Lieutenant (Combat) Examination, and only three (3) passed. To meet the requirements of the four-fifths rule of the EEOC guidelines, nine (9) blacks would have had to pass. With the prima facie case established, the burden of persuasion shifted to Defendant to prove by the preponderance of the evidence that the examination was a business necessity or was job-related.

2. **Defendant's Burden**

a. **Business Necessity**

When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the Court may examine closely any employment selection practice that discriminates against minorities. *Walker,* 726 F.2d at 1558. However, when an employer establishes that the job in question requires a certain amount of skill to ensure that an unqualified applicant does not create unnecessary economic or human risks, the employer meets its burden of persuading the Court that the employment practice is a business necessity. *Id. See Hodgson v. Greyhound Lines, Inc.,* 499 F.2d 859 (7th Cir. 1974), cert. denied 419 U.S. 122 (1975) (applicants for bus driver must be younger than 35 years old because accident rate increases as driver ages); *Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972) (requirement that applicants for flight officer have at least 500 flight

hours upheld because job requires high degree of skill and economic human risks are great).

The evidence produced at trial satisfies the Court that the public safety concerns presented in this case warrant strict promotional standards. Defendant has an obligation to demand and pursue excellence in its Public Safety Department.

b. Relationship to the Job

After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was job-related. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. The job functions required of a fire lieutenant (combat) were developed by individuals who not only had served in the position of fire lieutenant (combat) in the past, but also were now responsible for seeing that those who were, at present, fire lieutenants (combat) performed their jobs effectively. The makeup committee was composed of individuals intimately familiar with the work behaviors and

knowledge necessary for the position of fire lieutenant (combat). Additionally, the questions were drawn to test those functions, or knowledge, from materials used to train fire lieutenants (combat).

Evidence that the examination was not job-related was noticeably lacking. Plaintiff's expert never correlated the test with successful job performance, but rather correlated the pass-fail rate of whites to blacks. This correlation certainly was evidence of the disproportionate impact of the examination, but was not evidence that rebutted Defendant's contention that the test was job-related. The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended or used to discriminate on the basis of race.

This Court finds that the 1981 examination was "appropriate for the selection of qualified applicants

for the job in question." *Washington v. Davis,* 426 U.S. 229, 247 (1976). Those who performed well on the examination would be expected to be the best-qualified for the position of fire lieutenant in combat because they demonstrated better knowledge of the behaviors and knowledge required in such a position than those who scored poorly.

The above-conclusion suffices to refute statistical evidence that the test has a disproportionate racial impact. *Washington,* 426 U.S. at 246. This Court finds that Defendant successfully carried its burden of production. Therefore, Plaintiff had to show the availability of other selection devices with a lesser adverse impact, or show that the employer was using the practice as a pretext for discrimination.

3. Pretext for Discrimination or Other Selection Devices

In rebuttal to Defendant's evidence, Plaintiff presented only his own testimony. Plaintiff testified that he believed the Fire Department had

discriminated against him as well as against seventeen (17) other blacks in its promotion procedures. Absolutely no evidence was presented that persuades this Court that Defendant's employment practice, includes its promotional examination, is not worthy of credence.

Neither is the Court persuaded that other less discriminatory alternatives were available, but not used. To the contrary, evidence was submitted, albeit by the Defendant, that alternative methods historically were used and/or considered, but were not used in this case for legitimate reasons. In fact, in this Courts opinion, such alternative methods would have afforded Defendants more of an opportunity to discriminate against blacks.

For example, testimony was given about utilizing a performance examination. If a performance examination had been given, it would have necessitated the starting of one hundred twenty (120) fires so that each candidate could be rated on his ability to put out a fire. Such a rating procedure

could lead to very subjective results, an end the objective exam was designed to prevent.

A second alternative selection procedure would have been to conduct an unassembled examination. An unassembled examination entails the rating of candidates based on their education and experience. In this Court's opinion, such a candidate possesses a degree in firefighting, or has experience as a firefighter, does not automatically mean that the candidate possesses the knowledge necessary to the successful performance of fire lieutenant in combat.

Although testimony was given to show that composing an eligible list on a pass-fail basis rather than on a ranking basis would have had less adverse impact in terms of selection, the evidence clearly showed that such a change would have only slightly altered statistically the adverse impact of the examination.

Accordingly, this Court finds, based on the evidence submitted as a whole and the testimony presented to this Court at trial, that Plaintiff failed to

sufficiently sustain his burden of persuasion under Title VII. Therefore, judgment is hereby entered in favor of Defendant, THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, and against Plaintiff, WINSTON NASH, and the Defendant shall go hence without day.

DONE and ORDERED in Chambers at Jacksonville, Florida this 4th day of May, 1987.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:

William Lee Allen, Esq.
Steven E. Rohan, Esq.

Opinion of the Eleventh Circuit, Filed February 25, 1988

Cite as 837 F.2d 1534 (11th Cir. 1988)

Winston NASH, Plaintiff–Appellant,

v.

The CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation, Defendant–Appellee.

No. 87–3360.

United States Court of Appeals,
Eleventh Circuit.

Feb. 25, 1988.

Rehearing and Rehearing En Banc
Denied March 29, 1988.

Black fire fighter brought suit against city alleging that city discriminated against him by failing to promote him to fire lieutenant because fire fighter did not pass promotion examination. After remand by the Court of Appeals, 763 F.2d 1393, the United States District Court for the Middle District of Florida, No. 83–241–CIV-J–16, John H. Moore, II, J., entered judgment for city, and fire fighter appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) evidence that test for promoting fire fighters was drafted by qualified city employees was insufficient to establish that test questions were job-related, and (2) fire fighter's establishment of prima facie case of employment discrimination and city's

failure to show job relatedness of examination with discriminatory impact precluded redetermination of issues on remand, so that only issue remaining on remand would be liability of city.

Reversed and remanded with instruction.

1. Civil Rights ⇐43

Once employee has demonstrated that facially neutral employment or promotion practice has discriminatory impact, burden shifts to employer to demonstrate that practice has manifest relationship to employment in question or is business necessity; if employer meets burden, employee may still prevail by establishing that employer uses practice as mere pretext for discrimination, but if employer fails to meet burden, then discrimination has been proved, and there is no need to examine pretext or to consider existence of less discriminatory alternative practices, and employee is entitled to relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⇐43

Once fire fighter passed over for promotion due to test results established prima facie case of disparate impact of test, it was city's burden to show that test was job-related, not fire fighter's burden to show that test was not job-related. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐44(4)

Evidence that test for promoting fire fighters was drafted by qualified city employees was insufficient to establish that test questions were job-related, in employment discrimination suit brought by black fire fighter; even qualified supervisory personnel can construct test questions unrelated to job performance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐9.10

Job-related test questions, for purposes of employment discrimination suit, are those that are shown by professionally acceptable methods to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to job or jobs for which candidates are evaluated. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐44(4)

City, which did not present evidence that actual test questions used in determining promotion of fire fighter and which presented expert who admitted he did not evaluate test questions as to whether or not they were job related, failed to establish that test related to job performance, in seeking to rebut black fire fighter's prima facie case of employment discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights ⇐44(4)

City's obligation to demand and pursue excellence in safety did not establish that examination for promotion of fire fighters which had discriminatory impact on blacks was business necessity, in light of admission of city expert that 27 of 97 questions on examination had adverse impact on black applicants and lack of evidence as to why racially discriminatory test was business necessity. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Federal Courts ⇐951

Black fire fighter's establishment of prima facie case of employment discrimination in passing over fire fighter for promotion and city's failure to show job relatedness of examination with discriminatory impact precluded redetermination of issues, on remand, so that only issue remaining on remand would be liability of city, in employment discrimination suit. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Winston Nash, pro se.

William Lee Allen, Thomas E. Crowder, Steven E. Rohan, Asst. Counsel, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and HATCHETT, Circuit Judges, and OWENS *, Chief District Judge.

VANCE, Circuit Judge:

This case involves step two of the familiar three-step analysis for Title VII disparate impact claims. The district court found first that appellant had satisfied his initial burden of identifying an employment practice with a discriminatory impact. The district court next found that appellee had avoided a finding of discrimination against it by satisfying its burden of demonstrating that the practice was a business necessity and had a manifest relationship to the employment in question. Because we hold that appellee has not satisfied this burden, we reverse without considering the third step in the analysis. We remand the case to the district court for the sole purpose of granting relief to the plaintiff as instructed in this opinion.

I.

Appellant Winston Nash visits this court a second time. The first round of proceedings is set out in detail in *Nash v. City of Jacksonville*, 763 F.2d 1393 (11th Cir.1985). Appellant, a black fire engineer in the City of Jacksonville fire department, applied for a promotion to combat lieutenant in 1976, 1978 and 1981. The City requires a score of 70 or higher on the (combat) promotion examination in order to be considered for promotion. Appellant scored an 84 on the test in 1975 and was placed on the promotion eligibility list. The list expired,

however, before the City promoted him. He scored 69 and 69.072 in his next two attempts, both below the cutoff score of 70.

The test was prepared by a committee of two fire chiefs and one captain. Although the City states that supervisory ability is necessary for the position of combat lieutenant, the City admits that there are no questions on the examination relating to supervisory skills because such skills cannot be tested by written examination.[1] Only three of the twenty blacks who had taken the test at the time of the trial had passed (none was promoted), while 57 of the 100 whites who had taken the test had passed. Because this violates the EEOC's "four-fifths rule", *see* 29 C.F.R. § 1607.4(D),[2] and because appellant's expert produced additional statistical evidence, the district found that appellant had stated a prima facie case of discriminatory impact. *See Nash*, 763 F.2d at 1395.

1. The development of the promotion examination is set out in detail in *Nash*, 763 F.2d at 1395–96.

2. 29 C.F.R. § 1607.4(D) provides in part:

> *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact....

The test questions themselves, however, never made their way into evidence. Neither appellant's expert witness nor the district court ever saw the questions. Appellant's expert concluded from indirect evidence that some of the test questions showed a disparate impact. Appellant's expert also testified that, based on his statistical analysis, it was impossible to "even conclude that the examination selected people who best performed on the examination, much less who ... would best perform on the job." The only witness who actually reviewed the test questions was the City's former personnel examiner and current retirement pension manager, who also served as the City's expert at trial. He refuted the conclusions of appellant's expert on the grounds that it was necessary to consider the actual questions (which appellant's expert was not allowed to do) in order to determine whether or not the questions were job-related. The district court credited the City's evidence, discredited the testimony of appellant's expert, and ruled for the City. The court, still without ever seeing the examination, found that it was content-valid and job-related.[3]

3. The district court completed the third part of the analysis and found that there were no less discriminatory ways for the City to select fire engineers for promotion.

On appeal this court subtly observed that "[h]ad the burden of persuasion as to 'content-validity' been placed where it should have been, on defendant, we think defendant might have felt it incumbent to produce the examination questions." 763 F.2d at 1398. This court then reversed the district court, "express[ing] wonder that any court should attempt to determine whether a written examination was 'job-related' and 'content-valid' without having before it the questions asked of the applicants." *Id.* Our wonder has now ripened into full incredulity, because on remand the district court ruled again for appellee, still without ever seeing the test questions. This appeal therefore forces us to abandon subtlety in applying the law under Title VII to the facts of this case.

II.

[1] Once an employee has demonstrated that a facially neutral employment or promotion practice has a discriminatory impact, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to the employment in question or is a business necessity. *See Connecticut v. Teal*, 457 U.S. 440, 446–47, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971); *Craig v. Alabama State Univ.*, 804 F.2d 682, 685 (11th Cir.1986); *Walker v. Jefferson County Home*, 726 F.2d 1554,

1558 (11th Cir.1984). If the employer meets this burden, the employee may still prevail by establishing that the employer used the practice as a mere pretext for discrimination. *Teal*, 457 U.S. at 447, 102 S.Ct. at 2530; *see Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Craig*, 804 F.2d at 685. If the employer fails to meet this burden then discrimination has been proved, and there is no need to examine pretext or to consider the existence of less discriminatory alternative practices. The employee is entitled to relief. *See Albemarle Paper*, 422 U.S. at 436, 95 S.Ct. at 2380; *Crawford v. Western Elec. Co., Inc.*, 745 F.2d 1373, 1386 (11th Cir.1984); *Walker*, 726 F.2d at 1559.

There is no dispute that the district court correctly found that appellant proved a prima facie case of discrimination. The district court found, however, that the City successfully carried its burden of proving that the promotion examination was job-related and a business necessity.[4] Under this burden the employer must show "that the challenged employment practice has a

4. At the first trial, the district court only required the City to "articulate" some legitimate, non-discriminating reasons, rather than carry the burden of persuasion. This is contrary to the law of disparate impact cases. *See Nash*, 763 at 1397–98.

'manifest relationship' to the employment in question, or in other words that it is supported by 'business necessity.'" *Craig*, 804 F.2d at 685 (citing *Griggs*, 401 U.S. at 431–32, 91 S.Ct. at 853–54).

A.

The district court found that the test was job-related. This finding is reversible either if it is clearly erroneous or if the district court erroneously applied the law. *Nash*, 763 F.2d at 1396–97. The district court based its conclusion on the procedure used to construct the test and on the fact that appellant failed to produce evidence that the examination was not job-related. This conclusion, however, was based on both legal errors and clearly erroneous factual findings.

The district court first committed reversible error by repeating the same legal error it committed in its first ruling. In *Nash* this court instructed the district court that in Title VII disparate impact cases the burden is on the employer to prove job-relatedness. 763 F.2d at 1397. This court wrote that in an impact case the employer must do more than "articulate" non-discriminatory reasons for its employment practice. *Id.* This court noted that the district court repeatedly stated that the plaintiff "has failed to persuade the court 'by a preponderance of the evidence.' The idea seems to be that mere 'articulation' shifts the burden back to plaintiff to persuade that

the test is discriminatory, but this is contrary to the authorities in this circuit as to 'impact' employment test cases...." *Id.* at 1398.

[2] On remand, the district court committed the same error. Finding the test job-related, the district court wrote in its memorandum opinion: "Evidence that the examination was not job-related was noticeably lacking. Plaintiff's expert never correlated the test with successful job performance...." As we thought we had made clear, once the plaintiff made out his prima facie case of disparate impact, it was the defendant's burden to show that the test was job-related, not the plaintiff's burden to show the test was not job-related.

[3] The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job-related. Even qualified supervisory personnel can construct test questions very unrelated to job performance. The fact that the City presented evidence relating to how the test was constructed is not legally sufficient by itself to show the questions were job-related.

[4, 5] Job-related test questions are those that are "shown, by professionally acceptable methods, to be 'predictive of or

significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.'" *Albemarle Paper*, 422 U.S. at 431, 95 S.Ct. at 2378 (quoting 29 C.F.R. § 1607.4(c)); *see Police Officers for Equal Rights v. City of Columbus*, 644 F.Supp. 393, 414 (S.D.Ohio 1985). In this case the City presented no evidence at all that the test questions were job-related in any way. The City did not present the actual test questions and the City's expert testified that he did not evaluate the test questions as to whether or not they were job-related.[5] Job-relatedness can be established through the testimony of expert witnesses supported by a validation study. *See, e.g., Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 480–81 (6th Cir.1987); *Davis v. City of Dallas*, 777 F.2d 205, 209–10 (5th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986); *Gillespie v. Wisconsin*, 771 F.2d 1035, 1041–44 (7th

5. The transcript of the trial reads:

Q (counsel for defendant): Did you evaluate the examination as to whether or not it related to job performance?

A (defendant's expert): As far as job performance, no.

The defendant's expert also testified that he was not familiar with the principles of validation and the use of personnel selection procedures set forth by the American Psychological Association. The EEOC's guidelines, 29 C.F.R. § 1607, are based on these guidelines. *Albemarle*, 422 U.S. at 430–31 & n. 29, 95 S.Ct. at 2378 & n. 29.

Cir.1985), *cert. denied*, 474 U.S. 1083, 106 S.Ct. 854, 88 L.Ed.2d 894 (1986); *Contreras v. Los Angeles*, 656 F.2d 1267, 1280–84 (9th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982); *Brunet v. City of Columbus*, 642 F.Supp. 1214, 1246–47 (S.D.Ohio 1986). In this case, however, there was no validation study conducted by an expert.[6] Without the test itself and with no testimony presented by the defendant regarding the job-relatedness of the questions, there was no way for the district court to conclude that the questions were job-related.

The best evidence on job-relatedness of the questions came from the testimony of appellant's expert, who testified that from his statistical analysis of the test results and his study of the materials he received from the City, the test was "not capable of

6. The City's personnel examiner assigned to the 1981 examination claims to have completed a content-validity study on the examination. There is no evidence, however, and the district made no finding, that the City's promotion test was validated under the EEOC guidelines. The EEOC guidelines, though not substantive regulations promulgated pursuant to procedures established by Congress, "are 'entitled to great deference.'" *Albemarle*, 422 U.S. at 431, 95 S.Ct. at 2378 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971)). Several courts have held that certain fire department examinations must be validated in conformity with the guidelines in order to prove job-relatedness. *See, e.g., Brunet*, 642 F.Supp. at 1245.

Appellant presented evidence that the City is in violation of several requirements for EEOC

being validated, because there's too many items that cannot be validated."[7] Indeed

validation. *See, e.g.*, 29 C.F.R. §§ 1607.5(G), 1607.14(C)(9) (use of selection procedure on a ranking basis); *id.* at §§ 1607.5(H), 1607.15(C)(7) (use of ranking system and cutoff scores); *id.* at § 1607.15(C) (documentation of content validity); *id.* at § 1607.5(I) (use of selection procedures for promotion). In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden. *See Albemarle*, 422 U.S. at 433 n. 32, 95 S.Ct. at 2379 n. 32. The City's expert, who testified that he had not conducted a content-validity study, was also a City employee. Had he evaluated the job-relatedness of the test questions, his testimony would be subject to examination with great care. *Id.*

7. The transcript of the trial reads:

Q (counsel for plaintiff): From your analysis of all the documentation and material that was supplied to you, ... what is your opinion concerning the validity of the selected procedure used? The test, in other words?

....

A (plaintiff's expert): From the documents that were given me, it appeared that there was no reason why one would think that they could have constructed a valid test, given the way they went about doing the job analysis. And given the fact that the test was constructed by listing reading material and selecting questions out of the reading material, rather than directly constructing the test to reflect the job, itself—and that was very clear in the materials, that that was the method of making the test—so that even at that point it appeared that what the test was, was some kind of quasi-academic hurdle. [The test did not] measur[e] performance on the job and us[e] performance on the job as the predictor of who had the most knowledge and information and ability and skill to perform the job....

the City admitted through the testimony of its current personnel examiner that the examination did not test the one aspect of job performance that differentiated the job of firefighter engineer from fire lieutenant (combat): supervisory skills. An officer's job in a fire department involves "complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test." *Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 359 (8th Cir.1980), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). It is a position "which involves tasks and characteristics which cannot be tested exclusively by such tests." *Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv.*, 625 F.Supp. 527, 547 (D.N.J.1985), *aff'd* 832 F.2d 811 (3d Cir.1987). The best that can be said of the City's test based on the evidence at trial was that it may have been valid with respect to reading materials provided to the applicants. This is immaterial, however, to whether the content of the questions related to the performance of the job. *See Vulcan Pioneers*, 832 F.2d at 815–16; *see also* 29 C.F.R. § 1607.14(C)(4) (a test that purports to sample work behavior should closely approximate the work situation). The district court's finding that the examination relates to job performance is therefore clearly erroneous.

B.

[6] The district court also found that the City's promotion examination was a business necessity. "The business necessity doctrine is 'very narrow,' and the employer bears the burden of not only articulating but also *proving* business necessity through the evidence." *Craig* 804 F.2d at 689 (quoting *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1389 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979)) (citation omitted) (emphasis in original). This court stated the test most recently in *Craig*:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

804 F.2d at 689 (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 245 (5th Cir.1974), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979)); *see Crawford*, 745 F.2d at 1384–85.

The district court found that the City had "an obligation to demand and pursue excellence in its Public Safety Department."

While this statement is correct, it is not a basis for finding that the test at issue was a business necessity. The City's expert admitted that 27 of the 97 questions on the 1981 examination had an adverse impact on black applicants. Thus while the City has a business necessity in ensuring that it promotes only qualified firefighters to lieutenant, it has no business purpose at all for using an improper means to do so. The City presented no evidence on why a racially discriminatory test is a business necessity. *See Crawford*, 745 F.2d at 1385–86 (no business necessity for the mechanics of employer's employment practice, even though theoretically the practice related to safety and efficiency). The district court's finding that the test was a business necessity is therefore clearly erroneous.

III.

[7] We therefore reverse the district court's judgment for the City and hold that because the City failed to meet its burden appellant is entitled to judgment. Where the plaintiff has established a prima facie case, and the defendant fails to show the job-relatedness of an examination with discriminatory impact, the issues are not open for redetermination on remand. *Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir.1986); *see Crawford*, 745 F.2d at 1386. We therefore remand the case to the district court for the entry of judgment on liability.

Plaintiff is entitled to the position of fire lieutenant (combat), with the seniority and benefits accorded a lieutenant as of the date the first lieutenant was selected for promotion from the eligibility list for the 1981 examination. We remand for judgment to that effect, for a determination of the amount of back pay and for such other relief as may be appropriate.

REVERSED and REMANDED with instructions.

* Honorable Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

Order of Denial of Petition for Rehearing and Suggestion of Rehearing En Banc Filed March 29, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3360

WINSTON NASH,

Plaintiff-Appellant,

versus

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion 2/25/88, 11 Cir., 198___, _____F.2d_____)
(March 29, 1988)

Before VANCE and HATCHETT, Circuit Judges, and OWENS*, Chief District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

s/ Robert S. Vance
United States Circuit Judge

*Hon. Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

Order of Supreme Court of the United States
Filed June 12, 1989

SUPREME COURT OF THE UNITED STATES

No. 87-1954

Consolidated City of Jacksonville,
Duval County, Florida, etc.

Petitioner,

v.

Winston Nash

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Wards Cove Packing Company, Inc. v. Antonio,* 490 U.S. _____ (1989).

IT IS FURTHER ORDERED that the petitioner, Consolidated City of Jacksonville, Duval

County, Florida, etc., recover from Winston Nash Two Hundred Dollars ($200.00) for its costs herein expended.

June 12, 1989

Clerk's costs: $200.00

Opinion of the Eleventh Circuit, Filed July 9, 1990

Cite as 905 F.2d 355 (11th Cir. 1990)

Winston NASH, Plaintiff–Appellant,

v.

The CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation, Defendant–Appellee.

No. 87–3360.

United States Court of Appeals,
Eleventh Circuit.

July 9, 1990.

Fire fighter brought action challenging denial of promotion. The United States District Court for the Middle District of Florida, No. 83–241–CIV-J–16, John H. Moore, II, J., entered judgment in favor of city, and fire fighter appealed. The Court of Appeals, 763 F.2d 1393, reversed. On remand, judgment was again entered in favor of the city, and fire fighter appealed. The Court of Appeals, 837 F.2d 1534, affirmed. The United States Supreme Court, 109 S.Ct. 3151, vacated. On remand, the Court of Appeals, Hatchett, Circuit Judge, held that: (1) statistical evidence created prima facie case of disparate impact, and (2) use of a passing score on the examination was a particular employment practice creating the disparate impact.

Prior opinion reinstated and case reversed and remanded with instructions.

1. Civil Rights ⇐153

Under the "disparate impact theory," an employment practice that has the effect of discriminating in any of the forbidden ways may be found to violate Title VII without evidence of the employer's subjective intent to discriminate. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–2(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇐386

Statistical evidence that only three of 20 blacks who took fire fighter's promotion exam passed, while 57 of the 100 whites who took the exam passed, established prima facie case of disparate impact. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–2(a).

3. Civil Rights ⇐153

Fact that an examinee's failure to pass fire fighter's promotion examination absolutely barred promotion was sufficient to show that the requirement of a passing score was a specific practice which created the disparate impact which resulted from the use of the test. Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e–2(a).

Winston Nash, Jacksonville, Fla., pro se.

William Lee Allen, Thomas E. Crowder, Steven E. Rohan, Asst. Counsels, Jacksonville, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before VANCE *, and HATCHETT, Circuit Judges, and OWENS **, Chief District Judge.

HATCHETT, Circuit Judge:

In this civil rights action, we reverse the district court's ruling that the City of Jacksonville's (Jacksonville) examination for the promotion of firefighters does not discriminate on the basis of race, in violation of Title VII. This court has twice before considered this case. On both occasions, we reversed the district court's judgments in favor of Jacksonville. *Nash v. Consol. City of Jacksonville*, 763 F.2d 1393 (11th Cir.1985) (*Nash I*); *Nash v. Consol. City of Jacksonville*, 837 F.2d 1534 (11th Cir.1988) (*Nash II*). In the latest case, *Nash II*, the United States Supreme Court remanded the case to this court for consideration in light of its holding in *Wards Cove Packing Co. v. Atonio*, — U.S. —, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Having considered *Wards Cove* and finding that it does not directly affect this case, we again reverse

the district court and remand with instructions.

I. FACTS AND PROCEDURAL HISTORY

A detailed account of the facts of this case is given in *Nash II.* 837 F.2d at 1535–36. We restate only those facts relevant to this stage of the appeal.

Jacksonville administers a written examination to firefighters seeking promotion. For promotion, firefighters who score 70 or higher on this examination are ranked on the basis of their individual scores and the amount of time each has worked for the fire department.

Winston Nash, a black fire engineer, in the Jacksonville Fire Department, applied for promotion to Fire Lieutenant (combat) in 1976, 1978, and 1981.[1] Because Nash scored 69 on the examination in 1978 and 69.072 in 1981, he has not been eligible for promotion.

[1] In March, 1983, Nash filed a complaint for injunctive relief alleging that the examination has a disparate impact on black persons in violation of Title VII of

1. In 1975, Nash scored 84 on the examination but was not promoted.

the Civil Rights Act of 1964 and other laws.[2] At trial, witnesses for Jacksonville testified that supervisory skills are the primary qualification for promotion to fire lieutenant. These witnesses also admitted that the written examination fails to test supervisory skills. Jacksonville did not offer the examination for admission into evidence at trial.

After examining statistical evidence on the relative performance of blacks and whites on the examination, the district court found that Nash had established a prima facie showing of discrimination against nonwhite examinees. Jacksonville

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), prohibits employers from discriminating against any individual with respect to hiring or the terms and conditions of employment based on that individual's race, color, religion, sex, or national origin; or from adversely limiting, segregating or classifying employees on those grounds. Title VII proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). It is this latter form of liability based upon practices which are "fair in form" but discriminatory in practice, and known as the "disparate impact" theory, that is involved in this case. Under this theory, an employment practice that has the effect of discriminating in any of the forbidden ways may be found to violate Title VII without evidence of the employer's subjective intent to discriminate.

does not contest this finding on appeal.[3] The district court, despite not having seen the examination, nevertheless found that the examination is content-valid and job-related, and entered judgment for Jacksonville.[4]

In *Nash I*, we held that the district court had improperly placed the burden of persuasion as to content-validity on Nash. In reversing the district court and remanding, we also expressed our "wonder that any court should attempt to determine whether a written examination was 'job-related' or 'content-valid' without having before it the questions asked of the applicants." 763 F.2d at 1398.

On remand, the district court again entered judgment for Jacksonville without reviewing the examination. In *Nash II*, we again reversed, rejecting as clearly erroneous the district court's finding that the City had met its burden of articulating that the

3. Jacksonville's expert witness testified that at least 27 of the 97 examination questions had an adverse impact on black examinees (the examination consisted of 100 questions, but 3 of the questions were determined to be defective as to all examinees and were not considered by the fire department in computing examination scores).

4. Only Jacksonville's former personnel examiner and current retirement pension manager, who also served as Jacksonville's expert at trial, actually reviewed the examination questions.

test was either job-related or a business necessity. We also instructed the district court to enter judgment for Nash, and remanded for calculation of damages. Following its opinion in *Wards Cove*, the Supreme Court vacated our holding in *Nash II* and remanded the case for consideration in light of its opinion. — U.S. ——, 109 S.Ct. 3151, 104 L.Ed.2d 1015.

II. DISCUSSION

In *Wards Cove*, the Supreme Court restructured the familiar three-step analysis for Title VII disparate impact claims by announcing a two-phase approach. *Wards Cove* involved a class action under Title VII brought by a group of minority workers against two companies that operated salmon canneries in Alaska. The district court entered judgment for the employer on all claims, and the employee class appealed. Sitting in banc, the Ninth Circuit held, among other things, that "[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer" to prove the business necessity of the practice. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987).

In its review of *Wards Cove*, the Supreme Court issued three separate holdings. First, the Court found that the particular statistical evidence relied upon by the Ninth Circuit was not sufficient to

make out a prima facie case of disparate impact. In *Wards Cove*, the class offered statistical evidence showing a high percentage of nonwhite workers in the unskilled cannery jobs and a low percentage of nonwhite workers in the skilled noncannery jobs. While noting that statistical proof can alone make out a prima facie case, the Supreme Court held that the statistical evidence offered in *Wards Cove* was insufficient because "[t]he 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market.'" *Wards Cove*, 109 S.Ct. at 2121 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977)).

[2] The statistical evidence presented in this case does not suffer from the defects the Supreme Court identified in *Wards Cove*. Specifically, the statistical evidence Nash introduced did not involve a comparison between the racial composition of lieutenants in the Jacksonville Fire Department and the racial composition of both the qualified and unqualified pool of firefighters seeking a promotion. Rather, the statistical evidence Nash presented involved a comparison between the racial composition of Jacksonville firefighters who passed the promotion exam, a specific employment practice, and those who did not pass. Those statistics showed that only 3 of the 20 blacks who took the exam in 1981

passed, while 57 of the 100 whites who took the exam passed. The district court correctly concluded that these statistics established a prima facie case of disparate impact. *See* 29 C.F.R. § 1607.4(D).

[3] Second, the Supreme Court held that a Title VII plaintiff must "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove*, 109 S.Ct. at 2124. In this case, Jacksonville admits that it refused to promote Nash because of his failure to score 70 or higher on the examination. Moreover, the fact that an examinee's failure to pass the examination absolutely bars promotion satisfies the Court's "specific causation" requirement.

Third, the Supreme Court announced a two-phase approach for analyzing Title VII disparate impact claims. The first phase requires a plaintiff to establish a prima facie case of disparate impact with respect to an employment practice. If a plaintiff meets the proof burdens necessary to make out a prima facie case, the case shifts to the second phase. "This phase ... contains two components: first, a consideration of the [business] justifications an employer offers for [its] use of [the challenged practice]; and second, the availability of alternate practices to achieve the same business ends, with less racial impact." *Wards Cove*, 109 S.Ct. at 2125.

Wards Cove primarily involved an examination of the type of statistical evidence a plaintiff must present in order to establish a prima facie case. Because we have determined that the evidence Nash presented does not contain the flaws condemned by the Supreme Court, no further discussion on that subject is necessary.

Although *Wards Cove* was primarily concerned with the type of statistical evidence a plaintiff must present in order to establish a prima facie case, we note that the Supreme Court also relaxed an employer's evidentiary burden by only requiring that the employer produce evidence of a legitimate business justification for an employment practice. *See Wards Cove*, 109 S.Ct. at 2126. This holding does not affect our conclusion because Jacksonville failed to meet its burden of producing evidence that the exam was job related and served the asserted business justification of promoting the most qualified firefighters to fire lieutenant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) (the evidence produced must be sufficient to raise a genuine issue of material fact).

III. CONCLUSION

Following the Supreme Court's directions, we have reconsidered *Nash II* in light of *Wards Cove* and find that the teachings of *Wards Cove* do not impact upon the type of evidence Nash presented. Accordingly, we reinstate *Nash II*, 837 F.2d 1534 (11th Cir.1988), and direct the district court to abide by the directions in that case upon the issuance of the mandate in this case.

REVERSED and REMANDED with instructions.

* Judge Robert S. Vance heard oral argument in this case prior to the Supreme Court's remand, but due to his death on December 16, 1989, he did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

** Honorable Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

Order of Denial of Petition for Rehearing and Suggestion of Rehearing En Banc Filed September 28, 1990

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3360

WINSTON NASH,

Plaintiff-Appellant,

versus

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA, a municipal corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

ON REMAND FROM THE UNITED STATES SUPREME COURT

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion 9/9/90, 11th Cir., 198 ___, _____ F.2d _____).
(September 28, 1990)

Before: VANCE* and HATCHETT, Circuit Judges, and OWENS**, Chief District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joseph W. Hatchett
United States Circuit Judge

*Judge Robert S. Vance heard oral argument in this case prior to the Supreme Court's remand, but due to his death on December 16, 1989, he did not participate in this decision. This case is decided by a quorum. SEE U.S.C. § 46(d).

**Hon. Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

Defendant's Motion For Protective Order, Served October 14, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, a municipal corporation,

Defendant.

MOTION AND MEMORANDUM OF LAW FOR PROTECTIVE ORDER OR IN CAMERA INSPECTION OF THE FIREFIGHTERS LIEUTENANT COMBAT EXAM

Defendant moves the Court for entry of an order protecting disclosure of the Firefighters Lieutenant Combat Exam administered in November 1981, and says:

1. The contents of the exam are confidential. To divulge the contents of the exam to plaintiff will compromise the examination and render all questions thereon unusable.

2. In the consolidated cases of *Coffee, et al. v. Braddy, et al. and Corley v. City of Jacksonville,* Judge Scott conducted an in camera inspection of the Firefighters entrance examination from which he made his determination. Such a procedure would be preferable to full disclosure of the exam and answers.

3. Defendant has conferred with opposing counsel and counsel has been unable to resolve the dispute.

Defendant therefore moves the Court for a Protective Order preventing the production of the Firefighters Lieutenant Combat Exam at the deposition of Darlene Horne on October 17, 1983, or in the alternative an order for in camera inspection by the Court of the subject examination.

MEMORANDUM OF LAW

Kerr v. U.S. District Court, 426 U.S. 394 (1976).

Coffee, et al.v. Braddy, et al., No. 71-44-Civ.J-S.

Corley v. City of Jacksonville, No. 80-383-Civ-J-S.

Respectfully submitted,

DAWSON A. McQUAIG
GENERAL COUNSEL

s/ Thomas E. Crowder
ASSISTANT COUNSEL
1300 City Hall
Jacksonville, Florida 32202
(904) 633-2460
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEITRA MICKS, 5411 Soutel Drive, Jacksonville, Florida 32208, Attorney for Plaintiff, by mail, this 14th day of October, 1983.

s/ Thomas E. Crowder
Attorney

Order Granting Protective Order,
Filed November 1, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, a municipal corporation,

Defendant.

ORDER

Defendant's Motion and Memorandum of Law for Protective Order or in Camera Inspection of the Firefighters Lieutenant Combat Exam filed on October 14, 1983, is GRANTED as to the request for a protective order, no opposition thereto having been filed pursuant to rule 3.01(b), Local Rules, Middle District of Florida. Accordingly, Defendant is not required to produce the Firefighters Lieutenant Combat Exam at the deposition of Darlene Horne.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of November, 1983.

s/ Howard T. Snyder
HOWARD T. SNYDER
United States Magistrate

Copies to:

Deitra Micks, Esquire
5411 Soutel Drive
Jacksonville, Florida 32208

Bill Allen, Esquire
Thomas E. Crowder, Esquire
Assistant General Counsel
Office of General Counsel
1300 City Hall
Jacksonville, Florida 32202

Plaintiff's Motion For Further Relief,
Filed June 24, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

v. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF
JACKSONVILLE, DUVAL COUNTY
FLORIDA, ETC.

Defendants.

PLAINTIFF'S MOTION FOR FURTHER RELIEF

Plaintiff, Winston Nash, through his undersigned counsel respectfully moves this Court pursuant to applicable Federal Rules of Civil and Appellate Procedure to render fact findings in accordance with the Judgment of Remand to this Court from the Eleventh Circuit in its opinion entered and issued as mandate dated July 17, 1985.

I HEREBY CERTIFY that a copy of the Motion for Further Relief has been mailed to the Office of the General Counsel, 1300 City Hall, Jacksonville, Fla. 32202 this 24th day of June, 1986.

s/ Deitra Micks
DEITRA MICKS Esquiress
Attorney for Plaintiff
5411 Soutel Drive
Jacksonville, Fla. 32208
(904) 764-5411

Defendant's Response To Plaintiff's Motion For Further Relief, Filed June 30, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, ETC.

Defendant.

RESPONSE TO PLAINTIFF'S MOTION FOR FURTHER RELIEF

Defendant, Consolidated City of Jacksonville, in response to Plaintiff's Motion for Further Relief states as follows:

1. That Plaintiff's request for this Honorable Court to render an amended order complying with the Opinion of the Eleventh Circuit Court of Appeals is in fact an appropriate request to which the defendant has no objection.

2. As this Honorable Court (1) presently has the transcript of testimony and all exhibits from

the last trial before it; (2) together with proposed finding of facts and conclusions of law by the parties; and (3) the appellate court simply clarified the law to be applied regarding the correct burdens of production and persuasion; and (4) this cause was tried by the Court without a jury and each party was provided a full opportunity to present evidence; this Honorable Court is appropriately postured to consider the evidence presented in light of the appellate decision and issue an Amended Opinion and Final Judgment without further hearing or expense to the parties.

GERALD E. SCHNEIDER
GENERAL COUNSEL

s/ Steven E. Rohan
STEVEN E. ROHAN
ASSISTANT COUNSEL

1300 City Hall
Jacksonville, Florida 32202
(904) 633-2460

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEITRA MICKS, 5411 Soutel Drive, Jacksonville, Florida 32208, Attorney for Plaintiff, by mail, this 27th day of June, 1986.

s/ Steven E. Rohan
Attorney

**Order Requesting Proposals,
Filed June 30, 1986**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINSTON NASH,

Plaintiff,

vs. No. 83-241-Civ-J-16

THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY FLORIDA, etc.

Defendant.

ORDER

After a review of the file and Plaintiff's motion for further relief, filed June 26, 1986, the Court now

ORDERS and ADJUDGES:

That Plaintiff and Defendant shall file proposed findings of fact, with citations to the trial transcript, and conclusions of law, in accordance with the Eleventh Circuit's decision rendered June 25, 1985, within ten (10) days of the date of this Order.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 30th day of June, 1986.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of record

PERTINENT TRIAL TESTIMONY OF THE PLAINTIFF

"Q Isn't it fair to say that the -- each one of those publications that's on the reading list for the lieutenant's exam was in -- at one time or another included in the training that you received in the fire station?

"A Probably at one time or another." (R5-129)

***

"Q Were those questions on the examination about subjects that come up in the -- in your operation as a fire fighter?

"A Yes, they were." (R5-130)

***

"Q Any of that training that went on in the fire station come from these manuals that the -- the recommended reading for the fire lieutenant's exam?

"A They most certainly did; it most certainly did." (R5-132)

***

"THE COURT: What kind of special training do you feel that the fire department could

have offered you that would have assisted you in passing that test?

"A I don't think that the Jacksonville Fire Department could have given me any special training whatsoever. It was -- the problem that I had and that I saw and that I have felt was the problem with the test was the wording. And just like I said once, that I felt that I did pass that test." (R5-135-136)

***

"THE COURT: Do you feel that that test had any more impact, adverse impact, on you than it would have on a white person who had a bachelor's degree and a master's degree similar to yours?

"A I don't think that it had -- no, I don't think it had an impact, a greater impact on me; no. (R5-136)

"THE COURT: Okay. Are you suggesting, or -- well, are you suggesting that in the grading of that test they treated your paper any differently from that of a white person?

"A I'm -- I'm -- very close to that, Your Honor, very close to that, and I'm -- I'm very upset in respect to that." (R5-136)

***

"Q Did you tell them what particular areas of concern -- did you tell them what particular areas were of concern to you on the examination?

"A I felt like the whole test was -- it was -- it was not the same type of test that I had been exposed to that I felt was fair. It was a very difficult test and although it was difficult, I -- just like I said, I felt like I made in the nineties and I ended up with a 69.

"Q How was it difficult?

"A The wording and the questions, it was -- if one word was omitted or one word added, that's the type of situation that I remember from. It's been two -- two years and some change, and it's very difficult to pinpoint any section or any one thing, but that is the one thing that I do remember, specifically, the fact that the wording was very bad, very bad." (R5-123)

***

"Q Do you think if the tests were validated that you could pass?

"A Of course; it would be no problem.

May I add something to -- the situation, in fire fighting, what I feel is applicable to a supervisor in the Jacksonville Fire Department, anybody can serve as a supervisor in the Jacksonville Fire Department. We all come on the fire department and we learn in the training school how to fight fire, and you have to be able to fight fire to survive the year, in order to survive the first year of probation. And to survive with a reputation as being a good firefighter for eleven years is incredible. . . ." (R5-124)

* * *

"Q All the questions on it were job related; right?

"A I can't say that those questions were job related. The questions themselves posed a problem, not the fact that the -- the material was job related. I'm positive the material was job related.

"Q Mr. Nash, may I remind you that on direct examination in your testimony at the beginning of this trial, that you did make the statement that all the questions were job related?

"A If I said that I meant it just like I just said it, that the material that was given was job related. I'm sure the questions were aimed at job relatedness, but they missed the point.

"Q All the questions came from the study material?

"A As far as I know, yes, they did.

"Q There was no discrimination to you that would be any different than to a white male who had the same qualifications as you; is that correct?

"A Now, that's a very difficult question. As applies to this test?

"Q That's what we're talking about, is this test, yes, sir.

"A Would you repeat that.

"Q I said is there -- there is no discrimination that would apply to you that wouldn't apply to a white male with the same qualifications; is that correct?

"A I'm -- probably so, because it did -- the test did discriminate against the sixty that didn't pass.

"Q But the question here is did it discriminate against you, sir?

"A Yes, because I didn't pass the test. I studied for six months, six hours a day.

"Q Automatically it discriminated against you because you didn't pass it?

"A No, that's -- it didn't automatically discriminate against me. It was a very bad test.

PERTINENT TRIAL TESTIMONY OF DARLENE HORNE

"A We did a content valid study on this examination.

"Q All right. And why did you do the content validity study or content valid study?

"A Why did we do the content valid study?

"Q As opposed to the criterion.

"A As opposed to criterion study as such? If -- a criterion study means that when you use a selection procedure you have to relate that to their performance on the job also. That could take years to perform.

The other one, construct, involves personality traits, and we have never done that at the City.

"Q And what did you do and how did you proceed in doing the content validity study? What were the procedures?

"A Okay. Content validity, you either test for a work behavior -- if you do not test for the work behavior you test for knowledge that are the

prerequisite to do that work behavior, and that is what we did.

"Q Okay. And how did you determine those important aspects?" (R6-25-26)

***

"A . . . The work behaviors that we came up with, we came up with five work behaviors that were significant for this job. We rated them and then we came up with a list of knowledge that were required to do these work behaviors, and we also rated the knowledge." (R6-26)

***

"Q And I think you have previously testified as to the results of that examination, so we won't go into that.

Now, how was the job analyzed or reviewed?

"A The job experts. How was it analyzed?

"Q Yes.

"A They gave us --

"Q Okay. Go ahead.

"A They gave us all the work behaviors, the knowledge, skills and abilities to do the job. Of course we rated those, and then the job analysts came in and told the job experts also to look at the job specification for fire lieutenant combat to make sure that it was up-to-date." (R6-27)

***

"Q What kind of a review did you do on the examination as to the job analysis or the job review, if you will?

"A Okay. The job review done by the job analyst at the time or the job analysis during the complete exam development?

"Q The exam development.

"A The exam development job. I made sure that our procedures were abided by by our committee and that they stuck to our procedures that -- for instance, when they were writing the examination development questions, that they wrote only questions that were needed to perform as a fire lieutenant in the combat section.

"Q Did you give them general direction or were you present when they prepared the examination?

"A I was present." (R6-30)

* * *

"Q And how was this selection procedure that was used related to the job of fire lieutenant?

"A Well, it was testing for the knowledge that were needed to perform the work behaviors of the job." (R6-31)

* * *

"Q Now, isn't it a fact that you and your committee obtained the work behavior analysis -- that you obtained the work behaviors from the job descriptions?

"A No, it's not.

"Q Did you all do a formal investigation of the job content for fire lieutenants?

"A With my committee I did, yes." (R6-36)

* * *

"Q My question is, how was this work - well, wasn't this work behavior obtained from the job description of fire captain?

"A No, it was not. This work behavior was taken from the job experts that I work with for this examination and this is what they told me that a fire lieutenant in combat would do. I at no time conversed with them about a fire captain nor did I have job specifications for a fire captain." (R6-37)

PERTINENT TRIAL TESTIMONY OF JOHN BROXSON

"Q Before you got around to making up the questions, what did you do as a member of the testing committee?

"A We evaluated the position. I assume that's what you would call it.

"Q I show you Plaintiff's Exhibit Number 19, specifically, the work behavior analysis work sheet, and ask you if you have ever seen that?

"A Yes, sir, this is the work analysis work sheet we worked up on the job.

"Q And how did you go about developing that work sheet, sir?

"A Well, myself and Chief Chalker and Chief Pelham, the other two members on the committee, we talked about the job and what they did and broke it down to what we have here for a work sheet.

"Q What they did, you mean fire lieutenant?

"A Yes, sir, position." (R6-44)

* * *

"Q The -- how did this information of the items -- the questions that you came up with, how did that relate specifically to the job of fire lieutenant? How did you determine these would be the questions that would be asked?

"A We took the material and read through it and went through it, made up questions and then talked about it, and if we thought -- all three of us thought it was, you know, a good valid question, then it was applied to the test; then I assume personnel took it and certified it." (R6-48)

* * *

"Q Now, how did you -- what background or what did you use to determine that these were the most particular aspects of the fire lieutenants job? What did you rely upon for that?

"A These aspects we just made the questions on?

"Q Yes.

"A Well, through my knowledge, I haven't -- I've been on -- captain for four years and Chief Pelham and Chief Chalker and all that, they would have

probably I think a total of maybe forty-five, fifty years of fire fighting. We determined that these were the job of the fire lieutenant, and he would need these to -- need to know these to become a lieutenant." (R6-51-52)

* * *

"Q In doing the work behavior analysis, the original pages that you did there, were not those work behavior analyses related to the primary requirements of the job of fire lieutenant?

"A Yes, sir." (R6-65)

EEOC Uniform Guidelines or Employee Selection Procedures (1978) as amended, 1981, 29 CFR § 1607, Section 1B and Section 14C

Section 1B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D

* * *

Section 14C. *Technical standards for content validity studies.* - (1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as

provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment. leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure

are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

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No. 90-1016

In The

Supreme Court of the United States

October Term, 1990

THE CONSOLIDATED CITY OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
A MUNICIPAL CORPORATION,

Petitioner,

v.

WINSTON NASH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA FOR WRIT OF CERTIORARI

WINSTON F. NASH
Pro Se
Route 2 Box 686
Fort White, Florida 32038
(904) 497-4749

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The Eleventh Circuit correctly analyzed *Nash II* and reinstated the ruling for Respondent in *Nash III*. The Eleventh Circuit re-examined the case in light of the Supreme Court decision, *Wards Cove Packing Company Inc. v. Atonio*, 490 U.S. 642 (1989). The key principle in *Wards Cove* was the absence of an identifiable, specific factor needed for a disparate impact case. However, Respondent made a prima facie case by identifying the examination and promotional process as the barriers. The Petitioner presented no evidence to refute it. In addition, the Eleventh Circuit's decision in *Nash II* and *Nash III* were also based on at least six violations of EEOC guidelines, 29 CFR 1607, committed by the Petitioner. Further, the Petitioner never fully complied with Eleventh Circuit's mandates when they were issued. Now the Petitioner comes before this honorable Supreme Court seeking to perpetuate the historical and continuous, discriminatory system that operates unrestrained and outside EEOC guidelines. The Petitioner attempts to sanitize this glaring and chronic, discriminatory system. This attempt is demonstrated by articulated and abstract evidence, which is not based on the record.

The Petition for Writ of Certiorari should be denied.

ARGUMENT

I

THE ELEVENTH CIRCUIT DID NOT DISREGARD THE SUPREME COURT MANDATE, AND *NASH II & III* ARE NOT CONTRADICTION TO *WARDS COVE V. ATONIO*

The Eleventh Circuit correctly analyzed *Nash II* and decided that it did not contain the defects in *Wards Cove*.

The standards set by the Supreme Court in *Wards Cove,* concerning an identifiable barrier were met by respondent in his prima facie disparate impact case. The prima facie disparate impact case was made and not refuted by the Petitioner.

The Petitioner argues that it demonstrated approved content validity for the examination. This claim is contrary to the record in this case. The Petitioner created its own content validity approach and ignored guidelines set forth by EEOC. Further, the Petitioner caused the examination to be withheld from evidence at trial.

The Petition for Writ of Certiorari should be denied.

II

THE ELEVENTH CIRCUIT DID NOT ERRONEOUSLY RESTRICT THE TYPE OF EVIDENCE IT CONSIDERED LEGALLY SUFFICIENT TO ARTICULATE A BUSINESS JUSTIFICATION DEFENSE

The Petitioner caused the examination to be withheld from evidence, then attempted to rely on the lack of evidence as a defense. However, standards set by EEOC guidelines covering construction of examinations and content were not complied with by the Petitioner. In fact, the Petitioner has indicated that no evidence is needed to refute a prima facie, disparate impact case. Further, the Petitioner had many options concerning the promotional process. The City utilized those options in the past to promote white males.

What the examination process did, according to court records, was to select only white males for promotion, with the total exclusion of blacks. Evidence was also

given by the Petitioner's own examiner, who stated that supervisory knowledge, skills, and abilities could not be tested on the examination. Further, the only difference between the responsibilities for firefighter and fire lieutenant is the fact that a lieutenant supervises. Thus, an examination that does not test for that supervisory knowledge, skill and ability could not be content valid or job related. Petitioner's examination has no business justification.

The Eleventh Circuit's decision does not conflict with *Wards Cove* or other case law.

The Petition for Writ of Certiorari should be denied.

III

THE ELEVENTH CIRCUIT DID NOT VIOLATE THE "LAW OF THE CASE" DOCTRINE

In *Nash III*, the Eleventh Circuit did not contradict *Nash I*. The Petitioner suggests the Eleventh Circuit ruled that the City exceeded its burden of production. That finding is not in the *Nash I* decision. The *Nash I* decision states that the City went much beyond mere articulation. However, going much beyond mere articulation does not meet EEOC guidelines in 29 CFR 1607. Further, in *Nash I* the Eleventh Circuit ruled to reverse the District Court's decision based on additional factors in the case. No contradictions exist in the Eleventh Circuit's decisions.

The Petition for Writ of Certiorari should be denied.

IV

THE ELEVENTH CIRCUIT DID NOT VIOLATE STARE DECISIS AND THE PRINCIPLE OF INTERPANEL ACCORD

The Eleventh Circuit correctly decided in *Nash I, Nash II* and *Nash III* that the Petitioner had not carried its burden. This finding is consistent in each case. The Eleventh Circuit properly applied the law governing disparate impact cases. All standards set in *Wards Cove* were met.

In *Nash I,* contrary to what the Petitioner implies, the Eleventh Circuit did not rule that the City's evidence was legally sufficient. The Petitioner continues in its petition with this misleading and inaccurate theme, as if it were factual. It is not. Nowhere in the *Nash I* decision, does the Eleventh Circuit find that the Petitioner's evidence is sufficient.

The examination process that the Petitioner used violated 29 CFR 1607, EEOC guidelines numerous times. Thus, creating disparate impact. Further, the examination process had no business necessity, was non-validated and served as an absolute barrier.

The Petition for Writ of Certiorari should be denied.

V

THE ELEVENTH CIRCUIT DID NOT ERR BY RULING AGAINST THE CITY AND IS NOT IN CONFLICT WITH *ANDERSON V. LIBERTY LOBBY, INC.*

At trial, Petitioner produced no evidence except that of articulation. In fact, the Petitioner caused the examination questions to be withheld from evidence. Petitioner

has consistently suggested that articulation of how the examination was constructed, be used as its best evidence in attempting to overcome a prima facie, disparate impact case. Petitioner also pursues an avenue which implies that *Wards Cove* removes all responsibility for production of evidence from the Petitioner in litigations.

Petitioner seeks to make the trial court's articulation of how the examination was constructed as evidence. However, the trial court is only paraphrasing what had been articulated by the Petitioner.

Petitioner states in its petition that the questions were drafted according to EEOC guidelines, 29 CFR 1607. That statement is contrary to court records. The Petitioner's own expert's testimony contradicts the claims of compliance. In *Nash II* at (A-76):

> 5. The transcript of trial reads:
>
> Q (counsel for defendant) Did you evaluate the examination as to whether or not it related to job performance?
>
> A (defendants expert) as far as job performance, No
>
> The defendant's expert also testified that he was not familiar with the principles of validation and the use of personnel selection procedures set forth by the American Psychological Association. The EEOC's guidelines, 29 C.F.R. 1607. Arbemarle, 422 U.S. at 430-31 & n.29, 95 S. Ct. at 2378 & n.29.

Thus, if the City's expert witness does not know the principles of validation according to EEOC guidelines, 29 CFR 1607, then the guidelines were not followed. Further,

the Petitioner's examiner also testified that the supervisory knowledge, skills and abilities could not be tested. In *Nash II* (A-79):

> The City admitted through the testimony of its current personnel examiner that the examination did not test the one aspect of job performance that differentiated the job of firefighter engineer from fire lieutenant (combat): *supervisory skills*.

Petitioner strongly states in its petition that in *Nash I* the Eleventh Circuit found that the City had exceeded its burden. However, no such findings are recorded in that decision. *Nash I* findings were that the City had not met its burden.

Petitioner had no business justification for the disparate impact created by the examination and promotional process. The City violated numerous EEOC guidelines in every aspect of the examination and promotional process.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

As the Eleventh Circuit properly recognized, relief to Respondent was justified. The Petitioner has historically ignored EEOC guidelines in every aspect of promotions. Now the City seeks confirmation of an overtly discriminatory promotional process.

This Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

WINSTON F. NASH
Respondent Pro Se
Route 2 Box 686
Fort White, Florida 32038
(904) 497-4749